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No. _____

In the Supreme Court of the United States

THE STATE OF SOUTH CAROLINA, PETITIONER,

v.

KENNETH NAVY, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court address the governing admissibility test of *Seibert*'s fractured opinion where the federal circuit courts and state high courts are deeply divided over *Seibert*'s application and *Navy* presents a scenario in which the majority applied the plurality test to exclude statements that would have clearly been admitted under Justice Kennedy's test?

2. Should this Court address *Navy*'s holding where it impermissibly broadened *Seibert*'s application to non-custodial settings?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of South Carolina, through the Attorney General of South Carolina, hereby petitions the Court for a Writ of Certiorari to review the decision of the Supreme Court of South Carolina.

OPINIONS BELOW

The South Carolina Supreme Court's opinion is reported at *State v. Navy*, 688 S.E.2d 838 (S.C. 2010), and is attached to this petition as Appendix A. The South Carolina Supreme Court's order denying rehearing is unpublished and is attached to this petition as Appendix B. The decision of the South Carolina Court of Appeals can be found at *State v. Navy*, 635 S.E.2d 549 (S.C. App. 2006), and is attached to this petition as Appendix C.

STATEMENT OF JURISDICTION

The South Carolina Supreme Court filed its order denying the petition for rehearing on March 2, 2010. This petition for writ of certiorari is therefore timely pursuant to Supreme Court Rule 13 because it has been filed within 90 days of March 2, 2010. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be... compelled in a criminal case to be a witness against himself...

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A jury convicted the Respondent of homicide by child abuse for smothering his twenty-three-month-old son. During the homicide investigation, the Respondent spoke with police at the police station and gave a statement. Upon signing the first statement, the officers asked him a few more questions and then read his *Miranda* rights. After waiving his rights, the Respondent provided two additional statements.

The trial court found the Respondent was not in custody at the time of his interview at the police station and allowed the admission of the Respondent's first pre-*Miranda* statement, as well as the Respondent's two post-*Miranda* statements.

The South Carolina Court of Appeals held, however, (1) the defendant was in custody, thus warranting *Miranda* warnings, and (2) mid-interrogation *Miranda* warnings, given after the Respondent gave an oral inculpatory statement, were ineffective.

The South Carolina Supreme Court reversed in part and unanimously found the Respondent was not in custody during the first statement. But, a slim majority, the court held the non-custodial interview "matured" into a custodial interrogation following the first statement. In the minutes after the first statement, prior to *Miranda* and the subsequent statements, the officers informed the Respondent the victim had been smothered and

asked the Respondent to explain again how he comforted the victim. At this time, the Respondent told Smith that he may have "popped" the victim on his back and may have "patted" the victim on his mouth to stop him from crying. (R. 351). Smith recalled that Navy asked him if he was under arrest. Smith told Navy, "no, we are just trying to get some answers." (R. 1304-05). The majority found "[a]t this juncture, the nature of the interrogation and Respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." In a 3-2 decision, the South Carolina Supreme Court held the written statements following *Miranda* warnings were not admissible, given a *Seibert* violation. The Chief Justice of the South Carolina Supreme Court authored the dissent, stating the situation had not matured into a custodial situation prior to *Miranda* and thus, *Seibert* did not apply. Again by a 3-2 split, the South Carolina Supreme Court denied the State's petition for rehearing.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This Court should grant review to identify the governing admissibility test of *Seibert*'s fractured opinion. The federal circuit courts and state high courts are deeply divided over *Seibert*'s application, which has led to inconsistent and

unreliable results. *Navy* requires this Court's determination of the reigning test because it presents a scenario in which the majority applied the plurality test to exclude statements that would have clearly been admitted under Justice Kennedy's test. This Court should also rectify *Navy*'s abandonment of established custody case law when *Navy* found an admittedly non-custodial questioning morphed into a custodial interrogation. Further, in applying *Seibert*'s plurality test, the *Navy* majority stretched the facts beyond reasonable interpretation, thereby widening the application of the test.

I. This Court should grant review to determine the meaning and applicability of Seibert's fractured opinion.

The federal circuit courts and state high courts nationwide are divided over which test controls *Missouri v. Seibert*, 542 U.S. 600 (2004). In *Seibert*, the police arrested Seibert in the middle of the night and took her to the police station for interrogation. The police employed an intentional strategy of withholding her *Miranda* rights through thirty to forty minutes of interrogation until she confessed. The police then gave her a twenty-minute break before mirandizing her. After her *Miranda* waiver, the police reviewed the information provided in her first unwarned

confession and solicited the same admissions post-*Miranda*.

A. The Seibert opinion is badly fractured

This Court decided *Seibert* in a 4-1-4 split. Justice Souter authored the plurality opinion and described the custodial interrogation as "systematic, exhaustive, and managed with psychological skill." *Id.* at 617. Justice Souter said the main concern in analyzing a two-part custodial interrogation is whether the intervening *Miranda* warnings were effective. To determine effectiveness, the plurality instructed courts to consider the following:

> 1. The completeness and detail of the questions and answers in the first round of interrogation,
> 2. The overlapping content of the two statements,
> 3. The timing and setting of the first and the second,
> 4. The continuity of police personnel, and
> 5. The degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615.

Justice Kennedy provided the fifth vote for the majority, but concurred in judgment only. Justice Kennedy agreed the "question-first" tactic used in *Seibert* undermined the purpose of *Miranda*, but objected to the plurality's test, stating:

> This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations. In my view, this test cuts too broadly. *Miranda's* clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity. I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.
>
> The admissibility of postwarning statements should continue to be governed by the principles of *Elstad*. . .

Id. at 621-622 (citations omitted).

Justice Kennedy's test focused on the subjective view of the officers. Both the plurality and the dissent firmly rejected an admissibility test based on the subjective intent of the officers.[1] The dissent also rejected the plurality's effectiveness test, however, and proposed a voluntariness test instead.

B. The Circuit Courts of Appeal and state courts of last resort are irreconcilably split over the meaning and applicability of Seibert.

1. The Third, Fourth, Fifth, and Eighth Circuits have applied *Marks* to *Seibert* to say Justice Kennedy's test prevails. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)).

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[1] The plurality said, "[b]ecause the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work." *Seibert* at 617. Justice O'Connor's dissent followed, "[t]he plurality's rejection of an intent-based test is also, in my view, correct." *Id.* at 624.

These circuits have determined Justice Kennedy's test represents the narrowest grounds of a fractured *Seibert* decision and therefore controls. The Third Circuit discarded the application of the plurality five-factor test, saying it was "not faulty, but it was unnecessary, having found the initial failure to give *Miranda* warnings inadvertent." The Third Circuit promoted Justice Kennedy's test and held absent evidence of deliberate police action, the court should proceed only under *Elstad*. *U.S. v. Kiam*, 432 F.3d 524, 532-533 (3rd Cir. 2006). *See also U.S. v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005) (The Fourth Circuit applied *Marks* to say, "Justice Kennedy's opinion therefore represents the holding of the *Seibert* Court."); *U.S. v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006)(holding that as the most narrow test, Justice Kennedy's test governs.); *U.S. v. Black Bear*, 422 R.3d 658, 664 (8th Cir. 2005) (Finds Justice Kennedy's test is the most narrow and prevailing test, stating "the key to *Seibert* is whether the police officer's technique was 'designed,' deliberate,' 'intentional,' or 'calculated' circumvention of *Miranda*.").

2. In direct contrast, the Seventh, Ninth, and Tenth Circuits have declined to declare Justice Kennedy's test as the voice of *Seibert*. These circuits reason that because both the plurality and the dissent have rejected a subjective test focused on the officer's intent, then Justice Kennedy's test cannot be the common denominator of this Court.

These circuits do not believe Justice Kennedy's test is a more narrow version of the plurality holding because the plurality has specifically rejected the premise of Justice Kennedy's test. Yet, these circuits remain unclear on which test ought to apply. Consequently, they have applied both the plurality test and Justice Kennedy's test out of precaution.

The Seventh Circuit concluded "the *Marks* rule is not applicable to *Seibert*. Although Justice Kennedy provided the crucial fifth vote for the majority, we find it a strain at best to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree." *U.S. v. Heron*, 564 F.3d 879, 884 (7th Cir. 2009).

> In a situation like this, it is risky to assume that the Court has announced any particular rule of law, since the plurality and dissent approaches garnered only four votes each. . . . In the case of *Seibert*, the only thing we know for sure is that at least seven members of the Court rejected an intent-based approach and accepted some kind of exception to *Elstad*, even if the scope of that exception remains unclear.

Id. at 885. (citing *U.S. v. Rodriguez-Preciado*, 399 F.3d 1118, 1141 (9th Cir. 2005).

The Seventh Circuit declined to "resolve once and for all what rule or rules governing two-step interrogations can be distilled from *Seibert*" because the statements involved were admissible under either test. *Id.*

In the Ninth Circuit, the *Rodriguez-Preciado* majority concluded that they did not need to decide whether they were bound by the plurality test or Justice Kennedy's test because the defendant was mirandized at the inception of the interrogation. *Rodriguez-Preciado* at 1139-1141. The *Rodriguez-Preciado* dissent, however, outlined the *Seibert* dilemma in detail, saying "no opinion in *Seibert* commanded the agreement of a majority of Justices," and *Seibert* has created great difficulty for courts attempting to ascertain the appropriate rule.

The dissent submitted Justice Kennedy's opinion cannot be the "narrowest opinion embodying a position supported by at least five Justices in the majority. It embodies a position supported by two Justices, at most." *Id.* at 1140.

The dissent further argued the application of *Marks* to *Seibert* is "problematic." "When ... one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will

turn a single opinion that lacks majority support into national law." *Id.* at 1140 (citations omitted).

The dissent believed that at least five Justices supported all but one of *Seibert*'s principles. The dissent noted seven Justices dismissed the subjective intent focus of an admissibility test. Five Jusices advocated overruling *Orso* and five Justices also advocated *Elstad* exceptions. Consequently, "[t]he only point not enjoying the assent of five Justices is the appropriate admissibility standard to apply, on which the Court is split 4-1-4." *Id.* at 1141.

The Tenth Circuit also rejected Justice Kennedy's test as the voice of *Seibert* saying, "Determining the proper application of the *Marks* rule to *Siebert* is not easy, because arguably Justice Kennedy's proposed holding in his concurrence was rejected by a majority of the Court." *U.S. v. Carrizales-Toledo*, 454 F.3d 1142, 1150 (10th Cir. 2006). The Tenth Circuit also declined to determine the governing test because the relevant statements were admissible under either the plurality or Justice Kennedy's test.

3. The Second and Eleventh Circuits have applied both the plurality test and Justice Kennedy's test to admit statements, without analyzing which test prevails. *U.S. v. Carter*, 489 F.3d 528 (2nd Cir. 2007) (Said *Seibert* required "deliberate" police action, but applied both Justice Kennedy's test and plurality factors to determine

Elstad applied). *U.S. v. Gonzalez-Lauzan*, 437 F.3d 1128 (11th Cir. 2006). (Applied both the plurality and Justice Kennedy's test to find the statements were admissible); *See also U.S. v. McConer*, 530 F.3d 484 (6th Cir. 2008).

4. To add to the disorder, the state high courts vary wildly in their application of *Seibert*, but the split in their application is less clear. An examination of state courts reflects mass uncertainty regarding *Seibert*'s proper interpretation. Some states have chosen to apply Justice Kennedy's test. *See Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006) (Applied Justice Kennedy's test, calling it the most narrow holding of the majority). Other states have chosen to apply the plurality test. *See State v. Farris*, 849 N.E.2d 985, 994 (Ohio 2006)(Agreed "with the Seibert plurality and dissent that the intent of the officer doing the questioning is not relevant in a Miranda analysis." The Court held the statements were inadmissible due to the same prewarning and postwarning content.); *State v. Jones*, 151 P.3d 22 (Kan. 2007) (adopted plurality effectiveness language); *State v. Northern*, 262 S.W.3d 741 (Tenn. 2008) (Said many courts apply Justice Kennedy's test because they believe it is the most narrow, but Justice Kennedy's reasoning is "directly inconsistent" with the plurality and dissent's reasoning. Consequently, court applied plurality test.); *State v. O'Neill*, 936 A.2d 438 (N.J.

2007) ("The *Seibert* opinions have sown confusion in the state and federal courts, which have attempted to divine the governing standard that applies." The court ultimately used the plurality test, mixed with state laws, to find Seibert applied to the case at hand).

Some states don't understand which test they are applying. Florida found where there was no deliberate action by police officers, *Elstad* applied because Justice Kennedy suggested the plurality test applied only to situations of intentional police conduct. *Davis v. State*, 990 So.2d 459 (Fl. 2008) ("Because this is not a situation where Justice Kennedy agreed the plurality's test would apply, *Elstad* applies, as the four dissenting justices and Justice Kennedy stated.").

C. Inconsistent and unreliable results.

The federal circuit courts and state high courts are split over whether Justice Kennedy's test represents the *Seibert* holding. This split has resulted in inconsistent and unreliable results.

Navy calls for this Court's clarification of the *Seibert*'s governing test. The *Navy* majority widened the plurality test to exclude statements that were clearly admissible under Justice Kennedy's test.

In considering statement admissibility, Justice Kennedy first looked for a "deliberate two-

step strategy" and if there was no deliberate strategy, *Elstad* applied. *Seibert* at 622. *Navy*'s trial judge found no evidence of coercive interrogation strategy. Contrary to *Seibert*, the *Navy* officers never said they intentionally withheld *Miranda* warnings to strategically extract a prewarning confession. Smith explained that he did not inform Navy of *Miranda*, because the discussion was "non-custodial." (R. 1274). Upon being confronted with his child's suffocation and rib fractures, Navy admitted he may have "popped" the child and "patted" his mouth. After these admissions, Smith advised Navy of his *Miranda* rights out of "an abundance of caution." (R. 1282-1283, 1303- 1306). Navy voluntarily waived these rights.[2] At most, the facts indicate the officers made a "good-faith *Miranda* mistake." *Seibert* at 615.

According to Justice Kennedy's test, absent evidence of a deliberate two-step strategy by the police, *Elstad* governs the admissibility of Navy's post-warning statements. *Oregon v. Elstad*, 470 U.S. 298, 318 (1985)) (considers whether the post-*Miranda* statement was voluntary). Evidence indicates the waiver was voluntary and the Respondent failed to argue otherwise below. Consequently, the application of Justice Kennedy's

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[2] Navy's waiver of his *Miranda* rights was undisputed on appeal.

test would have likely resulted in the admission of the Respondent's postwarning statements.

In employing a broadened version of the plurality test, *Navy* excluded statements that would have been admitted under Justice Kennedy's test. The disparity in results underscores the importance of distinguishing the reigning test.

II. The South Carolina Supreme Court impermissibly broadened Seibert's application to non-custodial settings.

A. Navy's majority stretched the facts beyond reasonable interpretation.

Prior to trial, the trial court conducted a *Jackson v. Denno* hearing to determine the admissibility of Navy's statements to the police. Lt. Smith testified *in camera* that he was the lead investigator in the death of the 23-month-old victim, on Sunday, February 9, 2003. (R. 1269-1270). On Wednesday morning at approximately 9:00 am, Smith and Sergeant Lancy Weeks went to talk with Navy at his home. Navy agreed to accompany them to the police station "to discuss some further details about this case." Smith stated Navy was "very agreeable and very cooperative. He said he would help in any way. He was glad to accompany [them] . . . that he only wanted some answers." Navy testified he wanted to delay the interview until after the victim's funeral visitation,

but he was told the interview could not wait. Smith recalled Navy was "upset" and crying at the time. They drove in an unmarked car. Smith and Weeks sat in the front while Navy sat in the back. Navy was neither handcuffed nor placed under arrest. Lt. Smith testified, "we basically just had some small talk on the way in the car." Navy was not questioned. (R. 1271-72, 1300-01, 1321). Smith testified that if Navy did not want to go with them, they would not have taken him. (R. 1271). Navy also admitted that he was informed that he would be back home in "couple of hours." Navy testified, "I just thought that they needed a quick statement from me and like they said they would take me back home."

Once they arrived at the police station, Navy was allowed to smoke a cigarette in the back parking lot. He also requested a soda. (R. 1273-1274). According to Smith, Navy cried and remained upset during the entire interview process. Smith stated that Navy was free to go home and would have been allowed to leave if he had asked to do so. (R. 1301- 1302).

Smith testified he took Weeks and Navy to his office where they went over Navy's statements from Sunday. (R. 1272- 1274). Smith explained that he did not inform Navy of his rights pursuant to *Miranda*, because the discussion was "non-custodial at that time." (R. 1274). Navy was "very cooperative," and spoke with them freely and voluntarily. (R. 1274). At 9:50, Navy gave the

police an oral statement. (R. 1274- 1275, 1281, 1421-23).

In this statement, Navy told the police that the victim fell out of his high chair that weekend, but he was okay and "acted normal" afterwards. On Sunday, Navy was at home when he heard the victim crying "like he had a nightmare." Navy went upstairs and found the child sitting up in his crib. Navy laid him down and patted him on the back to comfort him, and then went downstairs to get a bottle. Navy returned to find the victim having a hard time breathing. Navy panicked and ran up and down the stairs several times to figure out what was going on. Navy stated he went to see the victim again and he was lifeless. Navy administered CPR and called 911. Navy said he continued with CPR until the ambulance arrived. (R. 342-50). This first statement was typed and Navy signed each page.

After the first statement, Smith informed Navy the victim was suffocated and there was evidence of broken ribs. (R. 350-51). Navy "expressed some shock" about this information. Smith then asked Navy to explain again how he comforted the victim. At this time, Navy told Smith that he may have "popped" the victim on his back and may have "patted" the victim on his mouth to stop him from crying. (R. 351). Smith recalled that Navy asked him if he was under arrest. Smith told Navy, "no, we are just trying to get some answers." (R. 1304-05).

At that point, they took a break because Navy wanted to smoke another cigarette. Smith testified he accompanied Navy during the break because the Sheriff's office does not allow people to be unescorted in the Sheriff's department. Smith again stated that if Navy had requested to go home they would not have stopped him. He said Navy "was not in custody." (R. 1282, 1305, 1308).

They returned to the office and at 11:35, Smith advised Navy of his *Miranda* rights out of "an abundance of caution," "because I felt like that the latest responses possibly may lead into some incriminating statements[.]" (R. 1282-83, 1303-06). Navy acknowledged his rights and signed a written waiver. (R. 1283-86, 1420). Smith testified Navy understood his rights, and he voluntarily waived them and agreed to give another statement. (R. 1286-89).

Navy testified the police told him he "had" to come with them to give a statement, and that he had asked the officers if he could wait until after the victim's funeral. However, Navy admitted that he was informed that he would be back home in "couple of hours." Navy testified, "I just thought that they needed a quick statement from me and like they said they would take me back home."

B. Seibert did not in anyway change the test for custody determinations.

1. The South Carolina Court of Appeals held Respondent was in custody when the first oral statement was given to police and the trial court erred in finding to the contrary. The South Carolina Supreme Court majority found "it is debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record." Chief Justice Toal authored the dissent, but agreed with the majority that the Respondent was not in custody at the time of his first statement, finding the statement admissible.

The majority further found, however, the non-custodial interview turned into a custodial interrogation between Respondent's first statement and his *Miranda* warning. The dissenters disagreed, as does the Petitioner.

This Court has outlined the considerations for determining whether a defendant is in custody:

> Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a

> "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.

California v. Beheler, 463 U.S. 1121, 1125 (1983).

The Respondent did not think he was under arrest. He acknowledged the officers informed him that he would be back home in "couple of hours." The Respondent thought, "they needed a quick statement" before taking him home. The majority admitted the first statement was non-custodial. During the period identified as the point of escalation into custodial interrogation, the Respondent asked the officers if he was under arrest, and they informed him, "no, we are just trying to get some answers." (R. 1304-05).

The Respondent was admittedly aware he was not under arrest and this Court has identified that benchmark as the "ultimate inquiry." The majority disregarded *Beheler* to find the Respondent entered into custody even though he knew he was not under arrest and there were no changes in restraint or compulsion.

This Court has also held custody inquiries should be objective not subjective. "Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*,

511 U.S. 318, 323 (1994)*(citing Beckwith v. United States,* 425 U.S. 341 (1976)).

In this case, the objective circumstances of the interview did not differ between the initiation of the first statement and the implementation of *Miranda*. The first statement was held to be noncustodial and nothing about the setting or conditions of the interview changed. In declaring the officers "sprang" the news of his son's homicide on the Respondent and asked questions "designed to elicit incriminating information," the majority chose to focus on subjective considerations rather than the objective factors prescribed by this Court.

In *Beckwith,* this Court again emphasized custody determinations should look to the objective compulsion rather than the officer's subjective views. "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the *Miranda* requirements with regard to custodial questioning." *Beckwith* at 346-347 (quoting *U.S. v. Caiello,* 420 F.2d 471, 473 (2nd Cir. 1969)).

In explaining why the situation turned custodial, the *Navy* majority stated, "The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession." Again, the majority's statements demonstrate the court's focus on the "strength" and "content" of the officers'

"suspicions," rather than any escalation of compulsion. In fact, the majority neglected to describe any factors that increased the objective compulsion of the interview such that the situation became custodial.

In *Seibert*, the Court explicitly noted that *Seibert* was "arrested" and, thus, in custody prior to any questioning by the police. *Seibert* at 606. *Seibert* did not abrogate the long-standing principle that *Miranda* warnings are not required when the individual's freedom has not been so restricted as to render him in custody. *Orozco v. Texas*, 394 U.S. 324, 327 (1969). Thus, if a suspect gives an unwarned, voluntary confession before being taken into custody, a subsequent confession exacted after the waiver of his *Miranda* rights need not be suppressed. Since Navy was not subjected to "custodial" questioning, *Miranda* warnings were not required. *A fortiori*, *Seibert* was not applicable.

2. *Navy*'s misapplication of custody law has consequences exceeding the boundaries of this case. In addition to distorting established precedent, *Navy* has stripped law enforcement of clear guidelines for custody analysis. This Court has recognized it is important for police to have clear guidelines to follow. *See Maryland v. Shatzer*, __ U.S. __, 130 S.Ct. 1213 (2010). Though the Petitioner asserts the questioning never escalated into a custodial interrogation, if it had, it would

have been difficult for the officer to detect when the actual custodial interrogation began. Where even the state high court Chief Justice disputed the transition occurred, the officer was unlikely to realize he had entered the zone of custodial interrogation and *Miranda* was required. Justice Kennedy addressed this threat, stating:

> **An officer may not realize that a suspect is in custody and warnings are required**, and may not plan to question the suspect or may be waiting for a more appropriate time. Suppressing post-warning statements under such circumstances would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence." *Elstad, supra,* at 308, 105 S.Ct. 1285.

Seibert at 602 (emphasis added). Justice Kennedy's words speak to the situation at hand. Even if the situation had become one of custodial interrogation, which the Petitioner does not concede it did, the officer did not realize Navy was in custody and warnings were required. As a result, the Petitioner submits the facts fall under *Elstad* and suppressing post-warning statements two and three did not deter improper police conduct or serve the "Fifth Amendment goal of

assuring trustworthy evidence." *Elstad* at 308. It is not clear why *Navy* found the situation became custodial, but it is very clear that law enforcement will encounter great difficultly in understanding and applying *Navy*.

C. *Navy's majority disregarded this Court's custody case law.*

As stated, the majority found the first oral statement was given in a non-custodial situation, but following the statement, the situation transitioned into a custodial interrogation. In footnote 4 of their opinion, the majority explained they were not focused on the admissibility of the first statement, but "on the police actions and interrogation after that statement had been given." In the opinion, the majority elaborated, stating:

> After he gave this first statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in

> follow-up questioning, asking specifically how respondent had comforted the crying child. **At this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation.** In response to these follow-up questions, respondent told the officers he had "popped" the child on the back rather than simply patted him, and that he may have "patted" the child on its mouth to stop the crying.

Navy at 3 (emphasis added).

> The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having

> smothered him. Once those incriminating answers were given – i.e. after respondent admitted he had popped the child on the back and "patted" his mouth – respondent was permitted a supervised cigarette break, then given *Miranda* warnings, with interrogation by the same officer resuming immediately.

Navy at 6.

Chief Justice Toal dissented and asserted the following:

> In the present case, I agree with the majority that the first statement was admissible because Respondent was not in custody when it was given. Because there was no custodial interrogation regarding the first statement, there was no need for *Miranda* warnings. The majority states that the interrogation status changed from noncustodial to custodial when the police asked Respondent how he comforted the child. However, merely asking questions that result in inculpatory responses does not change a noncustodial interrogation into a custodial interrogation. If this were so,

> the nature of police investigation would be forever altered. There is no evidence in the record to suggest the circumstances of questioning changed such that a custodial interrogation resulted when the police began to elicit inculpatory information. Hence, because there was no custodial interrogation, *Seibert* does not apply.

It is not entirely clear what the majority believed led to the heightened custodial level of the interview, but the following occurred between the first statement and *Miranda*, which is the period identified by the majority as when the custodial interrogation began: (1) The officers confronted the Respondent with information inconsistent with his prior statement, namely that his child had been killed; (2) The officers asked the Respondent to explain how he comforted the child; (3) The Respondent provided slightly incriminating answers that he may have "popped" the victim on his back and may have "patted" the victim on his mouth to stop him from crying; and (4) The officers administered *Miranda* warnings. None of these occurrences taken alone or together should have impacted the Respondent's custodial position. As Chief Justice Toal correctly asserted, there was "no evidence" to support the majority's custody determination. In contorting custody case law,

Navy created another layer of confusion on top of the misapplication of *Seibert*.

D. By stretching the facts beyond reasonable interpretation, Navy broadened the applicability of the plurality test.

The *Navy* majority significantly expanded the boundaries of *Seibert*'s plurality test when it applied *Seibert* to exclude *Navy*'s statements.

1. The first prong of the plurality's test considers "the completeness and detail of the questions and answers in the first round of interrogation." *Id.* at 615. In *Seibert*, the officer obtained a full confession pre-*Miranda* and then got the defendant to repeat her confession following her *Miranda*.

"Question-first's object, however, is to render *Miranda* warnings ineffective by waiting to give them until after the suspect has already confessed." *Seibert* at 601 (emphasis added). Justice Souter also stated, "This case tests a police protocol for custodial interrogation that calls for giving no warning of the rights to silence and counsel until interrogation has produced a confession." *Id.* at 604. (emphasis added). "[T]he sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble." *Id.* at 611. (emphasis added).

The *Navy* majority reasoned the situation became custodial after Respondent's first statement, so the "first round of interrogation" occurred during the grey area following the first statement and before the *Miranda* warnings. During this time, Officer Smith informed Navy the victim had been suffocated and there was evidence of broken ribs. Smith asked Navy to explain how he "comforted the baby, touched the baby, and that kind of thing." Unlike *Seibert*, these few pre-*Miranda* questions were limited and brief, lacking completeness or extensive detail. Merely asking the Respondent to explain how he comforted and touched the baby could hardly be described as "systematic, exhaustive, and managed with psychological skill." *Id.* at 616.

Navy's answers also fall short of the full confession described in *Seibert*. Navy told them "that he sort of popped the baby in his back when he was on his stomach, and he said he sort of may have patted the mouth to calm the crying." These answers cannot be considered a full confession, particularly in light of postwarning admissions.

2. Justice Souter also stated the court must consider the overlapping content between the prewarning and postwarning statements. Navy's brief answers are so limited in scope that virtually everything provided in the post-*Miranda* statements was new information. Justice Souter said, "[w]hen the police were finished there was

little, if anything, of incriminating potential left unsaid." *Id.* at 617. Here, the *Navy* majority highlighted the extensive additional information provided in the postwarning statements:

> Following the *Miranda* warnings, respondent gave his second statement, this one in writing, at 11:40 am. Significantly, in this second statement, respondent described the events as **"the same as in his first statement," except that:**
>
> 1) He could not get the child to be quiet, and while the crying child was sitting up in the crib, respondent put his hand over the child's mouth, but did not hold it there.
>
> 2) Respondent then laid the child on his stomach in the crib and "popped" him in the middle of the back, causing the child to cry "one time real loud." Respondent then put his hand over the child's mouth again to try to stop the crying, then noticed the child could not get his breath, perhaps as the result of the pop on the back.

3) Respondent, thinking he had knocked the child's breath out, went downstairs and returned with a bottle.

4) The child was still "making that noise" "like he was still trying to catch his breath" and respondent panicked. As the child quit and then resumed breathing, respondent went downstairs and got Terry.

5) When respondent and Terry got back upstairs, the child was not breathing.

6) In response to the question: "When you placed your hand over [the child's] mouth, is it possible that your hand covered his nose area as well," respondent answered "It could have been."

Q. When you popped him in the back, did you have your fist balled up?

A. No sir. It was my flat hand.

Q. How hard did you pop him?

A. Not like trying to kill him or nothing. I just popped him.

...

Q. Why did you pop [him] in the back Sunday?

A. I was frustrated because he was crying.

Following this second statement, which was reduced to writing, Sgt. Weeks contacted the pathologist who had conducted the autopsy to ask whether the actions respondent admitted committing in his second statement "could have caused" the child's death. The pathologist said no, and told the officer that the hand would have had to cover the child's nose and mouth for at least a minute. The officers then obtained a third written statement from respondent at

12:25 pm. The brief questions and answers are:

Q. [Respondent], is it possible that you held your hand over [the child's] mouth and nose for a longer period of time then you first related to us that you did?

A. Yeah, it could have been longer.

Q. How long do you think it could have been?

A. I don't know.

Q. Can you give us any idea at all how long you might have held your hand over his nose and mouth?

A. A minute, not more than two minutes.

Q. When you removed your hand the last time was [the child] breathing?

A. He was gasping for breath.

Navy at 3-5 (emphasis added).

Pre-*Miranda*, Navy told the officer "that he sort of popped the baby in his back when he was on his stomach, and he said he sort of may have patted the mouth to calm the crying." Post-*Miranda*, Navy admitted to popping the child hard out of frustration and covering the child's nose and mouth simultaneously for one to two minutes to the point that the child was "gasping for breath." The postwarning statement was not a repetition of a prewarning information. Rather, the initial statements simply hinted at culpability while the latter statements amounted to outright confessions.

3. *Navy*'s majority also erred when considering "the timing and setting" between the two statements. The majority stated, "the officers questioned respondent at headquarters for almost three hours before giving the warning." *Navy* at 7. As outlined in the opinion, the officers came to Navy's home at approximately 9:00 am. At 9:50 am, Navy began his first oral statement, which was then typed up for Navy's signature and signed by Navy. At the time of the oral statement, the majority found Navy was not in custody. The majority stated the line of questioning did not transition into a custodial interrogation until the officers asked a few questions to follow-up on the oral statement. After these follow-up questions, Navy was permitted an additional break and informed he was not under arrest. At 11:35, Navy was mirandized.

The officers did not subject Navy to three hours of custodial interrogation prior to a *Miranda* warning. The *Miranda* warning came approximately two hours and thirty-five minutes after the police went to Navy's home. More importantly, however, the majority categorized the bulk of that time as non-custodial. As a result, even if the questions following the oral statement properly mark the initiation of a custodial interrogation, the time lapsed between the initiation of the custodial interrogation and the implementation of *Miranda* warnings amounted to a matter of minutes rather than hours. This Court has made it clear that officers do not need to mirandize individuals who are not in custody[3] and Navy disregards this Court's precedent by factoring noncustodial interview time into their calculation of *Miranda* delay.

4. *Navy* is further distinguished from *Seibert* where Navy's statements prior to his *Miranda* warning are not identified as inadmissible. *Seibert* is clear that the officer erred in failing to warn the defendant that her prior statement was not admissible against her. In *Navy*, the majority found the first statement was admissible, but did not determine the admissibility of Navy's brief statements during the alleged prewarning custodial interrogation (which is the time period between the

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[3] *See Orozco v. Texas*, 394 U.S. 324, 327 (1969).

oral statement and the *Miranda* warnings). The majority stated the officer failed to inform Navy "the answers given after the first statement but before the administration of *Miranda* warnings may not be admissible." *Navy* at 6 (emphasis added). Where Navy's statements prior to *Miranda* may or may not be admissible, *Seibert* does not apply. Rather, *Seibert* only applies when the prior confession is clearly inadmissible.

5. *Navy* grossly erred by misinterpreting the facts to find the plurality test called for exclusion of the Navy's postwarning statements. *Seibert* targeted circumstances that "challenge the comprehensibility and efficacy of the *Miranda* warning to the point that a reasonable person in the suspect's shoes could not have understood them to convey a message that she retained a choice about continuing to talk." *Seibert* at 603.

Here, Officer Smith testified that after he informed Navy the victim had been suffocated, Navy asked if he was under arrest and the officer informed Navy he was not under arrest. Moreover, Navy also admitted that he was told he would be back home in "couple of hours." Navy testified, "I just thought that they needed a quick statement from me and like they said they would take me back home." Contrary to *Seibert*, the circumstances in Navy would allow a reasonable person in Navy's shoes to believe he had a choice about continuing to talk.

In finding the brief questioning of Navy rose to the level of *Seibert*, the *Navy* majority expanded the bounds of Seibert beyond those contemplated by this Court's plurality in *Seibert*. This Court must redress this inappropriate expansion of the plurality test as it is an important and recurring issue.

6. *Seibert*'s badly fractured opinion has created great confusion in the federal circuit courts and state high courts. Nationwide, courts are split in their application of *Seibert*'s admissibility test. This split has led to inconsistent and unreliable results. *Navy* squarely illustrates the problem of *Seibert*'s uncertainty. In *Navy*, the majority used an enlarged version of the plurality test to exclude statements that would have been clearly admissible under Justice Kennedy's test. Moreover, the *Navy* majority grossly disregarded this Court's custody standards to find an admittedly noncustodial questioning became a custodial interrogation. In doing so, *Navy* added another layer of confusion to the *Seibert* mire. *Navy* also stretched the prongs of the plurality test to exclude postwarning statements, thereby widening the plurality holding. Ultimately, the repetition and importance of the confusion surrounding the *Seibert* holding begs this Court for clarification. Further, *Navy*'s abandonment of custody precedent and unreasonable extension of the plurality test require this Court's remedy.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

The South Carolina Supreme Court Opinion dated January 11, 2010.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

The State, Petitioner,

v.

Kenneth Navy, Jr.,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 26759
Heard April 22, 2009 – Filed January 11, 2010

AFFIRMED IN PART; REVERSED IN PART

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, Assistant Attorney General Michelle J. Parsons, and Warren Blair Giese, all of Columbia, for Petitioner.

Acting Chief Appellate Defender Robert M. Dudek, of Columbia, for Respondent.

JUSTICE PLEICONES:

Respondent was convicted of homicide by child abuse in the suffocation death of his almost two year old son and received a twenty year sentence. On appeal, the Court of Appeals reversed, holding "the trial court erred in admitting [respondent's] voluntary oral statement and the second and third written statements." State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (Ct. App. 2006). We granted the State's petition for certiorari, and now affirm the decision to the extent it holds the second and third written statements are inadmissible under Missouri v. Seibert, 542 U.S. 600 (2004), but reverse the holding that the first oral statement was erroneously admitted.

FACTS

At approximately 4 pm on Sunday, February 9, 2003, EMS responded to a 911 call placed from a residence. When they arrived, respondent was administering CPR to his son. The child had no heartbeat or respiration, and attempts to resuscitate him in the ambulance and at the

hospital were unsuccessful. The child was pronounced dead at 4:58 pm.

An autopsy was performed on Monday. The doctor testified there was no medical reason for the child to die, and opined that the death was the result of suffocation. He also found that the child had four older healing rib fractures in his back, fractures which had occurred at different times.

Respondent gave a statement at the hospital on Sunday night, but because he was so upset and distraught it was thought to be incomplete. On Wednesday morning, Sgt. Weeks and Investigator Smith went to respondent's residence with the intent of taking him from the home to the sheriff's office to interview him and obtain another statement. The decision to talk with respondent was prompted by a meeting with the autopsy doctor the day before who told the officers that the only way the child could have died was by smothering or suffocation.

When the officers arrived at the home, they told respondent they needed to ask some additional questions. Respondent was very cooperative, stating he wanted answers too, but he was upset and crying at the home and remained upset and crying throughout the entire time period from the time the officers arrived at the home

(approximately 9 am) until they obtained the third statement (1 pm). The officers knew that the child's funeral home visitation was scheduled for later that Wednesday, and told respondent and his family that they would have respondent back in time for the service.

1) The victim awoke crying as if from a nightmare;

2) Respondent comforted him, putting him back in the crib, and patting him on his back;

3) Respondent went downstairs to get a bottle: upon returning upstairs he noticed the child was having breathing problems;[1]

4) Respondent "panicked" and went up and down stairs several times until he "figured out" what was going on and returned upstairs bringing with him his friend Terry who was visiting;

5) He picked the "lifeless" child up, and told Terry to take the other child downstairs and keep her from seeing

what was going on;

6) Respondent took the lifeless child downstairs, put him on the floor, and performed CPR three times[2] before calling 911;

7) Respondent continued CPR until EMS arrived.

Respondent's first statement was given at the station at 9:50 am. In this oral statement, respondent maintained that he was watching TV on the first floor while the two younger children (the victim and a four year old daughter) napped upstairs. He told the officers:

Respondent's first statement was given at the station at 9:50 am. In this oral statement, respondent maintained that he was watching TV on the first floor while the two younger children (the victim and a four year old daughter) napped upstairs. He told the officers:

This statement is largely consistent with the statement respondent gave at the hospital after the child died.

At the Sheriff's Department respondent was given cigarettes and permitted to take escorted smoking breaks. The investigator testified respondent was not in custody or under arrest, and agreed that respondent was free to tell the officers to take him home anytime he wanted.

After he gave this first statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in follow-up questioning, asking specifically how respondent had comforted the crying child. At this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation. In response to these follow-up questions, respondent told the officers he had "popped" the child on the back rather than simply patted him, and that he may have "patted" the child on its mouth to stop the crying.

After eliciting the answers in which respondent admitting hitting the child and interfering with the

child's breathing, the officers allowed him another smoke break. Investigator Smith insisted at trial that respondent was still free to leave, but also testified that he "perceived that the line of questioning may move further into what he had just told us." Smith decided it was now appropriate to give respondent *Miranda* warnings and administered them to respondent at 11:35 am.

Following the *Miranda* warnings, respondent gave his second statement, this one in writing, at 11:40 am. Significantly, in this second statement, respondent described the events as "the same as in his first statement," except that:

1) He could not get the child to be quiet, and while the crying child was sitting up in the crib, respondent put his hand over the child's mouth, but did not hold it there.

2) Respondent then laid the child on his stomach in the crib and "popped" him in the middle of the back, causing the child to cry "one time real loud." Respondent then put his hand over the child's mouth again to try to stop the crying, then noticed the child could not get his

breath, perhaps as the result of the pop on the back.

3) Respondent, thinking he had knocked the child's breath out, went downstairs and returned with a bottle.

4) The child was still "making that noise" "like he was still trying to catch his breath" and respondent panicked. As the child quit and then resumed breathing, respondent went downstairs and got Terry.

5) When respondent and Terry got back upstairs, the child was not breathing.

6) In response to the question: "When you placed your hand over [the child's] mouth, is it possible that your hand covered his nose area as well," respondent answered "It could have been."

Q. When you popped him in the back, did you have your fist balled up?

A. No sir. It was my flat hand.

Q. How hard did you pop him?

A. Not like trying to kill him or nothing. I just popped him.

...

Q. Why did you pop [him] in the back Sunday?

A. I was frustrated because he was crying.

Following this second statement, which was reduced to writing, Sgt. Weeks contacted the pathologist who had conducted the autopsy to ask whether the actions respondent admitted committing in his second statement "could have caused" the child's death. The pathologist said no, and told the officer that the hand would have had to cover the child's nose and mouth for at least a minute. The officers then obtained a third written statement from respondent at 12:25 pm. The brief questions and answers are:

Q. [Respondent], is it possible that you held your hand over [the child's] mouth and nose for a longer period of time then you first related to us that you did?

A. Yeah, it could have been longer.

Q. How long do you think it could have been?

A. I don't know.

Q. Can you give us any idea at all how long you might have held your hand over his nose and mouth?

A. A minute, not more than two minutes.

Q. When you removed your hand the last time was [the child] breathing?

A. He was gasping for breath.

Respondent moved to suppress all three statements, but particularly the written second and

third statements. He argued that the statements were not voluntary, in that he was distraught, sleep-deprived, and shocked by the information that his child had been suffocated and had rib injuries. Specifically, respondent argued that the second and third statements were unconstitutionally obtained since the officers conducted unwarned custodial interrogation after he gave the first oral statement, obtained incriminating evidence, and only then *Mirandized* him and took the official second and third statements.

The trial court admitted all three statements, finding that respondent was not in custody, was not significantly deprived of his freedom, and that the first statement was voluntary and no *Miranda* warning rights were required. As to the second and third statements, he made the finding the statements were *Mirandized* and freely and voluntarily given. On appeal, the Court of Appeals reversed, finding none of the three statements should have been admitted.

ISSUE

Whether the Court of Appeals erred in reversing the trial court's decision to admit respondent's three statements?

ANALYSIS

A. First Statement

On appeal, the Court of Appeals, citing State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003), held the first statement should have been suppressed primarily because respondent was in custody at the time of the statement. The State contends the Court of Appeals erred in reaching this result. We agree with the State that the Court of Appeals erred in reversing the trial judge's ruling admitting respondent's oral statement.

Whether a suspect is in custody is determined by an examination of the totality of the circumstances, such as the location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning. It is an objective determination, that is, would a reasonable person have believed he was in custody. State v. Evans, *supra*. On appeal, the trial court's findings as to custody must be upheld where they are supported by the record. Id.

In our opinion, it is debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in

custody should have been upheld as it is supported by the record. State v. Evans, *supra*. In light of this, the Court of Appeals erred in finding the first statement should have been suppressed.

B. Second and Third Statements

The Court of Appeals held that respondent's second and third statements should have been suppressed because they were obtained in violation of the rule announced in Missouri v. Seibert, 542 U.S. 600 (2004).[3] We agree.

In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the Seibert plurality opinion, are:

> 1) the completeness and detail of the question and answers in the first round of interrogation;
> 2) the timing and setting of the first questioning and the second;

3) the continuity of police personnel; and

4) the degree to which the interrogator's questions treated the second round as continuous with the first.

Justice Kennedy wrote separately, stating that while he agreed with much of the plurality opinion, he wished to emphasize that not every *Miranda* violation would require suppression. He explained that an exception should be made where the officer may not have realized that a suspect is in custody and therefore a warning was required, or where the officer did not plan to question the suspect at that juncture. Justice Kennedy noted that in Seibert, the two-step technique was used to deliberately avoid *Miranda*, using a strategy based on the assumption that *Miranda* warnings will mean less when given after an incriminating statement has already been made. Under these circumstances, Justice Kennedy agreed the statements must be suppressed unless "curative measures" were taken. As examples of curative actions, Justice Kennedy suggested a substantial break in time and circumstances between the pre-warning statement and the warned, or an additional warning before questioning resumes that the pre-warned statement is not admissible.

In our opinion, the Court of Appeals correctly concluded the officers' actions here violated Seibert and therefore the second and third written statements must be suppressed. The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having smothered him. Once those incriminating answers were given – i.e. after respondent admitted he had popped the child on the back and "patted" his mouth – respondent was permitted a supervised cigarette break, then given *Miranda* warnings, with interrogation by the same officer resuming immediately. Thus the four elements outlined in Seibert were met here. Moreover, none of the curative measures suggested by Justice Kennedy, i.e. an additional warning that the answers given after the first statement but before the administration of *Miranda* warnings may not be admissible,[4] a substantial break in time, or change of circumstances, occurred here.

The State would characterize the failure to initially administer warnings was merely one of "good faith," relying on Oregon v. Elstad, 470 U.S. 298 (1985). In Elstad, the officer asked a few questions of the suspect at the suspect's home before transporting him to the police station for questioning. Here, in contrast, the officers questioned respondent at headquarters for almost three hours before giving the warning. Moreover, after the first round of detailed questioning resulted in the first statement, respondent was confronted with the autopsy results which stated that the cause of death was suffocation, and that there was evidence of old bone breaks, followed by more detailed questioning. In our opinion, the Court of Appeals correctly held that the rule in Seibert applies here to bar admission of the second and third statements.

The State also argues that this case differs from Seibert in that there was evidence in Seibert of a deliberate police practice, the "question first" strategy. In our view, that deliberate practice was not determinative in Seibert. Moreover, since Seibert had not been decided before respondent's trial, it is not surprising that defense counsel did not specifically question Investigator Smith whether he was using this strategy. Finally, the Seibert Court acknowledged that it was unlikely

that law enforcement would admit it was using the "question first" technique, and thus evidence that officers were following this protocol was not necessary in order for a *Miranda* violation to be found. Seibert at footnote 6.

CONCLUSION

We affirm the Court of Appeals' decision to the extent it held that the second and third statements should have been suppressed, but reverse the decision holding that the first statement was unlawfully obtained.

AFFIRMED IN PART; REVERSED IN PART.

WALLER, J., and Acting Justice James R. Barber, III, concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs except for the finding that the third statement was obtained in a non-custodial setting.

CHIEF JUSTICE TOAL: I respectfully dissent from Part B of the majority opinion, and would reverse the court of appeals' decision finding the second and third written statements were inadmissible.

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the United States Supreme Court addressed the police practice of conducting a custodial interrogation in which no *Miranda* warnings were given until the interrogation produced a confession. *Seibert*, 542 U.S. at 604. The interrogating officers would follow the inadmissible statement with *Miranda* warnings, and then lead the suspect over the same ground a second time. *Id.* The Court concluded, "Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda's* constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible." *Id.* The *Seibert* Court elaborated:

> For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 612. In describing why the *Miranda* warnings were ineffective in *Seibert*, the Court stated, "[T]he police did not advise that her prior statement could not be used." *Id.* at 616. Thus, for *Seibert* to apply, the first unwarned custodial statement must be inadmissible. This is in part because the Court was concerned that the later interrogation was a mere continuation of the earlier unwarned and inadmissible custodial interrogation. *See id.* at 616-17.

In this matter, the majority's reliance on *Seibert* is misplaced. *Seibert* applies when police conduct an initial custodial interrogation without giving *Miranda* warnings, elicit a confession, and then give *Miranda* warnings before finally eliciting the same confession a second time. *See id.* at 604. In such circumstances, the first unwarned statement is inadmissible because it violates *Miranda*'s warning requirements. *See id.*

In the present case, I agree with the majority that the first statement was admissible because Respondent was not in custody when it was given. Because there was no custodial interrogation regarding the first statement, there was no need for *Miranda* warnings. The majority states that the interrogation status changed from noncustodial to custodial when the police asked Respondent how he

comforted the child. However, merely asking questions that result in inculpatory responses does not change a noncustodial interrogation into a custodial interrogation. If this were so, the nature of police investigation would be forever altered. There is no evidence in the record to suggest the circumstances of questioning changed such that a custodial interrogation resulted when the police began to elicit inculpatory information. Hence, because there was no custodial interrogation, *Seibert* does not apply.

The mere giving of *Miranda* warnings does not convert an otherwise noncustodial situation into a custodial interrogation. *State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). In this case, the second and third statements were obtained after *Miranda* warnings were given. However, giving *Miranda* warnings did not convert the noncustodial interrogation into a custodial interrogation. Because the second and third statements were obtained in a noncustodial setting, I would hold the second and third statements were admissible. Thus, I would reverse the court of appeals' decision and hold the trial court correctly allowed all three statements.

KITTREDGE, J., concurs except for the finding that the third s tatement was obtained in a non-custodial setting.

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[1] The child, who was born prematurely, had lung issues and was being weaned off a nebulizer and Albuterol. The mother was primarily involved in the child's medical treatments.

[2] There was evidence that a child should be placed on a hard surface such as a floor when CPR is to be administered.

[3] Seibert was filed eight days after respondent's trial ended.

[4] The dissent focuses on the fact the first statement was admissible, while our focus is on the police actions and interrogation after that statement had been given.

Appendix B

The South Carolina Supreme Court Order denying the Petition for Rehearing dated March 2, 2010.

March 2, 2010

Assistant Attorney General
Michelle Parsons Kelley
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: The State v. Navy, Kenneth Jr.

Dear Counsel,

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Costa M. Pleicones J.
s/ John H. Waller, Jr. J.
s/ James R. Barber, III A.J.

I would grant rehearing.

s/ Jean H. Toal C.J.
s/ John W. Kittredge J.

March 2, 2010."

The remittitur is today being forwarded to the lower court.

Very truly yours,

s/_____

CLERK

DES/dmh
cc: The Honorable Warren Blair Giese
Chief Appellate Defender Robert M. Dudek

Appendix C

The South Carolina Court of Appeals Opinion dated July 31, 2006

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

The State, Petitioner,

v.

Kenneth Navy, Jr.,
Respondent.

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4143
Heard March 7, 2006 – Filed July 31, 2006

REVERSED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman

Mark Rapoport; and Solicitor Warren Blair Giese, all of Columbia; for *Respondent*.

BEATTY, J.: Kenneth Navy appeals his conviction for homicide by child abuse, arguing the trial court erred in: (1) admitting three inculpatory statements; and (2) refusing to grant a new trial as a result of the State's treatment of defense witnesses and closing argument. We reverse.

FACTS

On February 9, 2003, Navy and his neighbor, Terry Crocker, were at Navy's residence watching television. Navy's twenty-three-month-old son, Kenneth Navy, III (the "victim"), was upstairs taking a nap. At some point the victim became distressed, and 911 was called. Emergency workers responding to that call observed Navy administering CPR to the victim. The victim was transported to the hospital and pronounced dead shortly after arrival. Navy informed the emergency workers, the nurse who greeted him at the hospital, and a child life specialist at the hospital that the victim had been born four months premature, had lung and heart problems, and had fallen from his highchair a few days prior to his death without any

serious injuries. Navy also stated he went upstairs to check on the victim, who had been fussy that day, he went downstairs to get the victim a bottle, and the victim was not breathing when he returned. Navy gave essentially the same version of events to a police detective at the hospital and to the coroner.

The coroner examining the victim's body discovered four rib fractures that had occurred at different times over a period of weeks prior to the victim's death. The coroner opined the victim had been suffocated. A tipster called and met with another coroner from the same office to say that she believed the victim had been suffocated and pushed down the stairs. The tipster, whom police were able to identify, wished to remain anonymous and was not identified at trial because she feared retaliation from her family and Navy's family.

After learning of the autopsy results and the information from the tipster, Lieutenant James Smith and Sergeant Lancy Weeks drove to Navy's home on the day of the victim's funeral visitation and asked if Navy would be willing to accompany them to the police station for more questioning. After Navy inquired as to whether the questioning could wait until after the funeral, he was informed that it could not wait. Navy was not placed under

arrest, but he agreed to ride with the officers in their car to the police station. Navy was not given his Miranda[1] warnings, and he gave a statement at 9:50 a.m. describing the events on the day the victim died. Navy initially stated that he went to check on the crying victim in his crib, he patted him on the back to comfort him, and he went downstairs to get a bottle. Upon his return, he realized the victim was having difficulty breathing, he panicked, ran up and down the stairs, and then returned to find the victim lifeless. The officers typed up the statement ("first written statement"), had Navy sign it, and then informed a shocked Navy that the victim died from suffocation and had broken ribs.

Smith then asked Navy to describe exactly how he comforted the victim. Navy stated he may have popped the victim on his back and patted the victim on his mouth to stop him from crying ("oral statement"). Navy was then given his Miranda warnings, and he signed a written waiver agreeing to talk with police at 11:35 a.m. In his second written statement given at 11:40 a.m., Navy indicated he put his hand over the victim's mouth when he could not get the child to be quiet. He stated he did not hold his hand there. Navy further stated: "I knew I knocked out his breath and I figured he would catch it by the time I got back up

to the room. I heard him making that noise. It was like he was still trying to catch his breath. That was when I panicked. He quit breathing . . . ." Navy admitted he could have placed his hand over the victim's nose as well.

After taking Navy's second written statement, Weeks consulted with the coroner. The coroner opined that Navy had to have held his hand over the victim's mouth and nose for more than just a brief period. Police confronted Navy with this information, and Navy gave a third written statement at 12:25 p.m. in which he said he could have held his hand over the victim's mouth and nose for a minute, but not more than two minutes. Navy stated the child was gasping for breath when he removed his hand. Navy was questioned for a total of approximately three hours.

Navy was placed under arrest for homicide by child abuse. He moved to suppress the oral statement and the second and third written statements prior to trial. After the Jackson v. Denno[2] hearing, the trial court denied the motion to suppress, finding the first statement was not a custodial statement and the second and third statements were given after Navy was given his Miranda warnings.

At trial, the State presented evidence that although the victim had serious lung difficulties immediately after his premature birth, the victim was healthy at the time of his death. Dr. Teresa Baggett, the pediatrician who treated the victim a few months prior to his death, testified that when the victim was born, he required oxygen and an apnea monitor for a few months, later suffered from an asthma-type condition called reactive airway disease, and required treatment with Albuteral, a nebulizer, monthly shots, and injections of Synergist to protect him from the respiratory syncytial virus (RSV). Dr. Baggett stated the victim was having difficulty breathing in August 2001, and the parents were instructed to perform aggressive chest physiotherapy, or pounding of the chest, to loosen lung secretions. At his October 2002 visit, the victim was wheezing and had an ear infection. However, when the victim returned for a follow up visit in November 2002, Dr. Baggett testified his lungs were clear and she advised the victim's mother to decrease the frequency of his nebulizer treatments.

A radiologist examined the victim's x-rays from his August 2001 treatment and from his autopsy. The radiologist testified that although the first of the three August 2001 x-rays was of poor quality, the other two showed no rib fractures. The radiologist

also opined that the four rib fractures visible in the victim's autopsy x-ray were caused by forceful trauma and could not have occurred from a fall or during aggressive chest physiotherapy or CPR. Further, Dr. Clay Nichols, the coroner who conducted the victim's autopsy, testified the victim's lungs were clear, normal, and not inflamed or filled with mucous at the time of death.

Navy presented evidence to show that he was not a violent person, that the victim's death could have resulted from his lung deficiencies, and that the rib fractures were old fractures from August 2001 that had not healed. Navy's orthopedic surgery expert, Dr. Thomas Trancik, testified the victim had four rib fractures based on the first August 2001 x-ray, which was of poor quality. He admitted he could not locate the fractures in the subsequent two August 2001 x-rays. Trancik also opined the rib fractures could be consistent with the administration of CPR at the time of the victim's death. During cross-examination, the State commented that Trancik was "no expert," Navy objected to the comment, it was struck from the record, and Navy did not request further instructions to the jury or a mistrial.

Navy's neighbor, Terry Crocker, Navy's sister, the victim's speech therapist, Navy's wife, and Navy's

father all testified that they never witnessed Navy being violent with his children. Crocker, who was in Navy's home at the time the victim stopped breathing, testified that Navy was not upset that day, that he witnessed Navy go upstairs to check on the victim, and that Navy returned downstairs very fast, saying the victim was not breathing.

Navy testified he never abused his children and did not suffocate his son. During cross-examination, the solicitor asked Navy to admit that "every time we took a break when the jury was gone you were laughing and cutting up, weren't you?" Navy's objection was sustained and no further instructions were requested. When the solicitor began screaming at Navy, the court instructed the solicitor to treat Navy "with respect." The State also brought out on cross-examination of the defense witnesses that although Navy had never been convicted of a violent crime, police had been called to his home numerous times for violent arguments, he had been suspended from high school for punching a coach, he had been accused of attempting to assault a sixteen-year-old girl, and he had been in a physical altercation with his father.

Navy was convicted of homicide by child abuse and sentenced to twenty years imprisonment. His

motion for a new trial was denied, and this appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only and is bound by the factual findings of the trial court unless clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Appellate review of whether a person is in custody for Miranda purposes is limited to a determination of whether the trial judge's ruling is supported by the record. State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003). Further, the trial court's decision to deny a motion for a new trial will not be disturbed absent an abuse of discretion. State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69 (Ct. App. 2000).

LAW/ANALYSIS

I. Suppression of Statements

Navy argues the trial court erred in refusing to suppress his three inculpatory statements. We agree.

"The purpose of the Miranda warnings is to apprise the defendant of [his] constitutional privilege not to

incriminate [himself] while in the custody of law enforcement." Evans, 354 S.C. at 583, 582 S.E.2d at 409. Miranda requires that warnings be given to a suspect after he or she has been taken into custody or deprived of his or her freedom in any significant way. Id. at 583, 582 S.E.2d at 410 (citing Miranda, 384 U.S. 436, 444 (1966)). This language has been interpreted to mean a "formal arrest or detention associated with a formal arrest." State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997). Whether a suspect is in "custody" for Miranda purposes is an objective determination based upon the totality of the circumstances, including "the individual's freedom to leave the scene and the purpose, place and length of the questioning. . . ." Id. "The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody." Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493-94 (1994). The custodial determination is not based upon the subjective views of the suspect or the interrogating officers. Easler, 327 S.C. at 128, 489 S.E.2d at 621.

A. Inculpatory Oral Statement

Navy argues the trial court erred in refusing to suppress his inculpatory oral statement because he

was in custody at the time and he was not given his Miranda warnings prior to making the statement.

At the Jackson v. Denno hearing, Lieutenant James Smith testified that Navy voluntarily accompanied him and Sergeant Laney Weeks back to the station to discuss the case. Smith testified he did not administer Miranda warnings because Navy was not under arrest, Smith informed Navy that he was not under arrest, and Navy was very cooperative with investigators despite being upset and crying. Smith stated he would not have taken Navy to the Sheriff's Department if Navy did not want to go. Once at the Sheriff's Department, Smith testified Navy was given a soda and escorted outside to smoke a cigarette. According to Smith, Navy would have been allowed to leave had he requested to do so.

Smith admitted he had the coroner's autopsy report prior to questioning Navy. After about one hour of questioning, Navy signed the first written statement that was substantially similar to the story given at the hospital. Smith testified he then confronted Navy with the coroner's opinion that the victim had been suffocated and had four fractured ribs. In response to Smith's question regarding how he comforted the victim, Navy gave the oral statement that he popped the victim on his back

and may have patted the victim's mouth to calm the crying. At that point, they took a break so Navy could smoke another cigarette outside. Smith testified he escorted Navy outside to smoke a cigarette because no one was allowed to wander the Sheriff's Department alone. Smith stated Navy was still not in custody and would have been allowed to go home if he had requested to do so. However, out of an abundance of caution, Smith stated he gave Navy his Miranda warnings when they returned to his office.

Navy testified at the Jackson v. Denno hearing that he was extremely upset and had not slept or eaten in three days when Smith and Weeks requested that he accompany them to give a statement. Navy stated he only completed the ninth grade in school and had difficulty reading cursive writing. Navy denied that he was given Miranda warnings after his oral statement, testifying that either he was not given Miranda warnings until his third statement or that he could not recall when he was given Miranda warnings. Navy testified that the first written statement, substantially similar to the statement he gave at the hospital, was the only correct statement. He claimed the officers placed the second and third written statement along with the first written statement in front of him, the officers required him to sign all three typed

statements at one time before he could go home, and Navy did not read the statements before signing them.

Citing State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003), Navy's counsel argued any reference to his oral statement that he "popped" the victim on the back should be suppressed because Navy was operating under an emotional disability and was not given Miranda warnings prior to making the statement. The trial court determined Navy was not in custody at the time he voluntarily gave his first statement[3] because he was free to leave. The court distinguished Evans from Navy's situation, finding there was a "bullying atmosphere" in questioning Evans and the police ignored her requests for help.

In Evans, the mentally disabled defendant was aggressively questioned at the police station about a fire at her home that killed her three children. During her three-hour interview, police repeatedly told her they did not believe her theories of how the fire could have started, and they ignored her repeated requests to "get her some help." Evans was escorted to and from the bathroom, and relatives who had accompanied her to the police station were not allowed to see her. The trial court suppressed the inculpatory statement Evans

eventually gave, finding Evans was in custody at the time and was not given her Miranda warnings. In making the custodial determination, the court: found Evans was *not free* to leave; considered the fact that the interrogation occurred in a back office at the police station; considered the fact that the interrogation was three hours long; and was concerned with the officers' purpose in their method of questioning. The supreme court held the trial court's order reflected that the court objectively considered the totality of the circumstances in determining that Evans was in custody. Evans, 354 S.C. at 583-84, 582 S.E.2d at 410.

Reviewing the totality of the circumstances, we find the present case is substantially similar to Evans such that the trial court erred in finding Navy was not in custody at the time of the oral inculpatory statement. Navy was informed by officers that questioning at the station could not wait. Thus, despite Navy's testimony that he willingly accompanied the officers, one could reasonably interpret the officers' refusal to delay the questioning until after the funeral as a mandate to accompany the officers. Navy was further transported to the Sheriff's Department in the backseat of a patrol car, rendering him unable to return home on his own. Further, Navy was not

allowed to walk about the Sheriff's Department freely, and he was accompanied for smoke breaks. Although the officers claimed they merely wanted a statement of the events on the date of the victim's death, Navy was repeatedly questioned for a length of time. Finally, the officers were familiar with the autopsy report prior to questioning Navy, indicating the purpose of the questioning was to obtain an inculpatory statement.

Viewing the length, location, and purpose of the questioning, a reasonable person would believe themselves to be in custody. Accordingly, Navy's oral statement should not have been admitted.

B. Second and Third Written Statements

Navy argues the trial court erred by failing to suppress his second and third written statements because they were obtained as a result of information learned from the oral inculpatory statement made prior to Miranda warnings.

Generally, an "initial failure to administer Miranda warnings before a statement is given does not taint a subsequent statement, made after a suspect has been fully advised of and has waived his Miranda rights, when both statements are voluntary." State v. Campbell, 287 S.C. 377, 379, 339 S.E.2d 109, 110

(1985); see Oregon v. Elstad, 470 U.S. 298, 309 (1985) ("It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.").

However, the United States Supreme Court has recently held unconstitutional the police tactic of "question-first," where officers intentionally question a suspect until inculpatory information is given and then provide Miranda warnings prior to having the suspect repeat the inculpatory information. Missouri v. Seibert, 542 U.S. 600, 613 (2004) (noting that Miranda warning given mid-interrogation, after a defendant had given an unwarned confession, was ineffective in informing a suspect that she could decide not to speak further with police after essentially saying everything there was to say; thus, the confession repeated

after the warning was given was inadmissible at trial). The plurality in Seibert noted as follows:

> [W]hen Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "deprive[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Moran v. Burbine, 475 U.S. 412, 424, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle.

Seibert, 542 U.S. at 613-14.

The Seibert plurality went on to distinguish the admissibility of subsequent statements elicited in an Elstad-type of confession from statements elicited pursuant to the "question-first" tactic.[4] Noting that the failure to give a warning prior to

the confession in Elstad was merely an oversight whereas the "question-first" tactic was purposefully designed to undermine Miranda warnings, the Seibert court pointed out several considerations to determine whether mid-interrogation Miranda warnings are effective, rendering subsequent statements admissible:

> The contrast between Elstad and this case reveals a series of relevant facts that bear on whether Miranda warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In Elstad, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's

> shoes could have seen the station house questioning as a new and distinct experience, the Miranda warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

Seibert, 542 U.S. at 615-16.

Applying the Seibert factors, we find the questioning of Navy was an integrated, coordinated, and continuing interrogation such that giving warnings mid-interrogation was ineffective and rendered the second and third written statements inadmissible. Navy was questioned at the police station, over a period of three hours, and by the same officers. The officers asked similar questions with each statement, and the three statements overlapped in content. The officer's questions to Navy post-Miranda warning were related to the oral inculpatory statement, indicating the officer treated the "second round as continuous with the first." Further, because the officers were familiar with the coroner's opinion that the victim was suffocated prior to questioning Navy, it can hardly be said that the failure to give Miranda warnings prior to obtaining the oral inculpatory statement was inadvertent, as was the case in Elstad. Because the officers' actions in the

present case are substantially similar to those in Seibert,[5] we find the trial court erred in finding the second and third statements were admissible.

To summarize, we find Navy was in custody at the time he gave his oral inculpatory statement, and the mid-interrogation Miranda warning given to Navy in this situation was not effective in advising him of his rights or the consequences of abandoning them. Accordingly, we reverse the trial court's finding that all three inculpatory statements were admissible.

II. Solicitor's Closing Argument

Citing Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994), Navy argues the trial court erred in refusing to grant him a new trial because the State's closing argument was outrageous. We disagree.

The trial court is given broad discretion in determining the appropriateness of a solicitor's closing argument. State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003). The trial court's ruling will not be disturbed on appellate review absent an abuse of discretion. Id. An appellant must prove both an abuse of discretion and resulting prejudice to warrant reversal. State

v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct. App. 1999).

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). In reviewing a solicitor's closing argument, the court must determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Caldwell, 300 S.C. 494, 504, 388 S.E.2d 816, 822 (1990). Improper comments do not require reversal if they are determined not to be prejudicial to the defendant. Rudd, 355 S.C. at 550, 586 S.E.2d at 157. Arguments of counsel are not considered so inflammatory as to require a reversal where "counsel responds in kind to a previous argument of opposing counsel." Dial v. Niggel Assocs., Inc., 333 S.C. 253, 258, 509 S.E.2d 269, 271 (1998). "On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Rudd, 355 S.C. at 550, 586 S.E.2d at 157.

During the solicitor's closing argument, he evaluated all of the evidence and testimony presented in Navy's defense. The solicitor referred to Navy's assertions in closing, his witnesses, or other evidence presented in Navy's defense as "lies," "liars," or "untrue" statements on at least seventeen occasions. Navy never objected to any of these statements. In his later motion for a new trial, Navy argued he was entitled to a new trial because the solicitor's argument was "extremely inflammatory" by attacking Navy's character, by referencing all the uncharged violent offenses, and by calling Navy's witnesses liars. Navy admitted he did not object to the closing argument, but he argued he was entitled to a new trial pursuant to Toyota of Florence v. Lynch due to the outrageousness of the closing argument. The court denied the motion for a new trial.

Generally, a party must make a contemporaneous objection to improper arguments or the objection is waived. Dial, 333 S.C. at 256-57, 509 S.E.2d at 271; State v. Young, 364 S.C. 476, 494, 613 S.E.2d 386, 395 (Ct. App. 2005). However, our supreme court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." Toyota of Florence v. Lynch, 314 S.C. 257, 263, 442

S.E.2d 611, 615 (1994) (holding a new trial should be granted, despite the lack of contemporaneous objections to closing argument, where counsel used posters in closing argument that invoked racial stereotypes and were highly prejudicial). The Toyota of Florence v. Lynch court described the circumstances of that particular case as "extraordinary," and the court noted that it did not condone the failure to make a contemporaneous objection. Id.; State v. Peay, 321 S.C. 405, 413, 468 S.E.2d 669, 673-74 (Ct. App. 1996) (noting the supreme court in Toyota of Florence v. Lynch "did not condone the failure to contemporaneously object, and described the circumstances in that case as 'extraordinary'").

The solicitor's closing argument in the present case was certainly aggressive. However, we do not find "extraordinary" circumstances present in this case that would excuse the failure to make a contemporaneous objection. Navy's defense at trial centered on his claim that he was not a violent person and that his son's injuries were the result of his lung disease and medical treatments. In this context, the solicitor's closing argument was a direct response to Navy's defense and merely pointed out the problems with Navy's argument based on the evidence of record. We do not find these remarks so inflammatory as to fall under the

Toyota decision. See Dial, 333 S.C. at 258, 509 S.E.2d at 271 ("In this case, counsel's 'deceit and lies' remark was in response to opposing counsel's repeated accusation of deception. In context, this remark was not so inflammatory as to come within the ambit of our decision in Toyota."). Accordingly, Navy's failure to raise any objection to the solicitor's closing argument waived the issue for review and the trial court did not err in refusing to grant Navy a new trial.[6]

CONCLUSION

We find the trial court erred in admitting Navy's voluntary oral statement and the second and third written statements. However, the court did not err in refusing to grant Navy a new trial based on the solicitor's closing argument. Nevertheless, because the court erred in admitting the three statements, Navy's conviction and sentence are

REVERSED.

HEARN, C.J., and HUFF, J., concur.

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Jackson v. Denno, 378 U.S. 368 (1964).

[3] It is unclear from the record whether the court was referring to the first written statement or to the inculpatory oral statement.

[4] In Elstad, the defendant was arrested for burglary at his home. Officers stopped in the living room on the way out of the home to inform his mother of the charges. While in the living room, Elstad confessed to being at the scene of the burglary. Officers then gave Elstad Miranda warnings prior to obtaining subsequent statements. The United States Supreme Court held that the simple failure to administer Miranda warnings prior to a confession, where no evidence of coercion or calculation was present, did not render subsequent, post-warning statements inadmissible. Oregon v. Elstad, 470 U.S. 298, 309 (1985).

[5] We are cognizant of the fact that Seibert was decided a week after the trial in this case, and Navy's counsel did not refer to the "question-first" tactic in moving to suppress Navy's statements. However, Navy's counsel argued that the written statements should be suppressed because Navy did not give a voluntary waiver. He argued the statements were taken from Navy "in furtherance and in addition and based upon unconstitutionally gathered information, violating his rights by getting the information about 'popping' before he had been Mirandized." Thus, the substance of Navy's argument is preserved for review.

[6] Navy also argues that he was entitled to have a new trial pursuant to Toyota due to the outrageousness of the State's trial tactics in bringing out his prior violent acts, pointing out that he was laughing during breaks to the jury, and saying

Trancik was not an expert. Toyota, however, only addressed outrageous conduct during closing argument. We decline to extend Toyota to apply to general trial tactics and cross-examination.

Appendix D

State's Petition for Rehearing from the South Carolina Supreme Court Decision dated January 11, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

Petitioner,

vs.

KENNETH NAVY, JR.,

Respondent.

Opinion No. 26759, Filed January 11, 2010

PETITION FOR REHEARING

On January 11, 2010, this Court issued an opinion in which it affirmed in part and reversed in

part the decision of the trial judge in this homicide by child abuse case. State v. Navy, Op. No. 26759 (S.C. Sup. Ct. January 11, 2010), Petitioner ("the State") respectfully petitions for rehearing on the issues that follow.

I. Seibert does not apply where the initial oral statement was admissible.

In a 3-2 decision, the majority of this Court reversed the Court of Appeal's decision that the trial court erroneously admitted Navy's first oral statement. The majority affirmed, however, the Court of Appeal's finding that the second and third written statements are inadmissible under Missouri v. Seibert, 542 U.S. 600 (2004).

The Court of Appeals previously held Navy was in custody when the first oral statement was given to police and the trial court erred in finding to the contrary. The State argued the trial court properly found Navy was not in custody at the time of the first oral statement and the trial court properly admitted the initial oral statement into evidence. This Court's majority found "it is debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record."

Chief Justice Toal authored the dissent and agreed with the majority "that the first statement was admissible because Respondent was not in custody when it was given."

While the State humbly agrees with both the majority and the dissent that the Respondent was not in custody at the time of the first oral statement, the State would respectfully assert that the majority may have misapprehended the application of Seibert to Navy's latter two written statements. As articulated by the dissent, in Missouri v. Seibert, 542 U.S. 600 (2004), the police employed an interrogation tactic in which they purposefully obtained inadmissible statements from the defendant, invoked *Miranda* warnings, and then obtained the same statement from the defendant a second time under the cloak of *Miranda*. As highlighted by the dissent, Seibert held,

> For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of

> interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 612.

The State respectfully submits Seibert differs dramatically from the case at hand where the defendant's initial statements in Seibert were inadmissible. As the dissent noted, Seibert specifies that the *Miranda* warnings given mid-interrogation were not effective because "[T]he police did not advise that her prior statement could not be used." Id. at 616. In Navy, the majority found the initial oral statement was admissible as Navy was not in custody. The State submits the dissent correctly argued that in order for Seibert to apply, Navy's initial, unwarned statement needed to be inadmissible. Since the statement was found to be admissible, the analysis falls outside the ambient of Seibert.

II. The non-custodial situation did not transition into a custodial interrogation prior to the *Miranda* warnings.

The State respectfully submits the oral statement was given in a non-custodial situation, which did not become custodial prior to Navy's

Miranda. In support of this argument, the relevant fact sequence is detailed below.

Prior to trial, the trial court conducted a Jackson v. Denno hearing to determine the admissibility of Navy's statements to the police. Lt. Smith testified *in camera* that he was the lead investigator in the death of the 23-month-old victim, on Sunday, February 9, 2003. (R. 61-62). At around nine o'clock in the morning on Wednesday, February 12, Smith and Deputy Lancy Weeks went to Navy's home. Smith testified that they were going to "get him into the office to interview him further and take another statement from him." (R. 62-63). The police had earlier spoken with Navy at the hospital shortly after the victim died. (R. 64-65, 90, 92).

Smith testified that Navy agreed to accompany them to the police station "to discuss some further details about this case." Smith stated that Navy was "very agreeable and very cooperative. He said he would help in any way . . . that he only wanted some answers." Smith recalled that Navy was upset and crying at the time. They drove in an unmarked car. Navy was neither handcuffed nor placed under arrest. (R. 63-64, 92-93). Smith said that if Navy did not want to go with them, they would not have taken him. (R. 63).

Smith testified that once they arrived at the police station, Navy was allowed to smoke a cigarette in the back parking lot. He also requested a soda. (R. 65-66). Smith recalled that Navy was still crying and he was upset during the entire interview process. Smith stated that Navy was free to go home if he had requested to do so. (R. 93- 94).

Smith testified that they then basically went over what Navy told the investigators on Sunday. (R. 64-66). He, Weeks, and Navy were in his office. (R. 64). Smith said that Navy was "very cooperative," and he spoke with them freely and voluntarily. (R. 66). Smith explained that he did not inform Navy of his rights pursuant to *Miranda*, because "it was non-custodial at that time." (R. 66). At 9:50, Navy gave the police a statement. It was typed and handed over to Navy, who then signed each page. (R. 66-67, 73; 1421-23).

Smith testified that they were already aware of the autopsy findings regarding the death of the victim, but they had not discussed this with Navy. (R. 73-74, 89). After the first statement, Smith told Navy that the victim had been suffocated and there was evidence of broken ribs. He recalled that Navy "expressed some shock" about the information. Smith asked Navy to explain how he "comforted the baby, touched the baby, and that kind of thing." Navy told them "that he sort of popped the baby in

his back when he was on his stomach, and he said he sort of may have patted the mouth to calm the crying." (R. 74, 95-96, 98-99, 110, 113-14).

Smith testified that at that point they took a break, because Navy wanted to smoke another cigarette. (R. 74). Smith said that he accompanied Navy during the break, because "nobody goes unescorted in the Sheriff's Department." (R. 121). Smith again stated that if Navy had requested to go home, they would not have stopped him. "He was not in custody." (R. 74, 97, 100). In fact, Navy asked Smith if he was under arrest. Smith told Navy, "no, we are just trying to get some answers." (R. 96-97).

When they got back into the office, Smith advised Navy of his *Miranda* rights as "an abundance of caution." It was 11:35. (R. 74-75, 95-98). Navy acknowledged his rights and signed a written waiver. (R. 75-78, 1420). Smith testified that Navy understood his rights, and he voluntarily waived them and agreed to give another statement. (R. 78-80).

Navy testified the police told him he "had" to come with them to give a statement, and that he had asked the officers if he could wait until after the victim's funeral. However, Navy admitted that he was informed that he would be back home in "couple of hours." Navy testified, "I just thought

that they needed a quick statement from me and like they said they would take me back home."

Though the majority found the first oral statement was given in a non-custodial situation, the majority held the situation transitioned into a custodial interrogation when the officers informed the defendant that the victim had past rib fractures and appeared to have been suffocated. In footnote 4, the majority explained they were not focused on the admissibility of the first statement, but "on the police actions and interrogation after that statement had been given." In the opinion, the majority elaborated, stating:

> After he gave this first statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in follow-up questioning, asking specifically how respondent had comforted the crying child. **At this juncture, the nature of the**

> **interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation.** In response to these follow-up questions, respondent told the officers he had "popped" the child on the back rather than simply patted him, and that he may have "patted" the child on its mouth to stop the crying.

Navy at 3 (emphasis added).

> The officers began the questioning of respondent with knowledge that the child had been suffocated and with the intention of eliciting a confession. After respondent's first oral statement, the officers "sprang" the suffocation/healing rib fractures information on respondent, and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have respondent admit to having hit the child and to having

> smothered him. Once those incriminating answers were given – i.e. after respondent admitted he had popped the child on the back and "patted" his mouth – respondent was permitted a supervised cigarette break, then given *Miranda* warnings, with interrogation by the same officer resuming immediately.

Navy at 6.

The State respectfully contends the limited questioning following the oral statement did not change a non-custodial questioning into a custodial interrogation. Further, the State echoes the dissent in respectfully submitting the mere application of *Miranda* warnings does not convert the interrogation from non-custodial to custodial. The majority held the first oral statement was admissible as evidence supported the trial court finding that Navy was not in custody. As the dissert asserted, because this first statement was not in a custodial setting, the officers did not need to administer *Miranda* warnings.

The dissent disputed the majority's holding on this point and the State respectfully supports

the dissent's position. Chief Justice Toal asserted the following:

> In the present case, I agree with the majority that the first statement was admissible because Respondent was not in custody when it was given. Because there was no custodial interrogation regarding the first statement, there was no need for *Miranda* warnings. The majority states that the interrogation status changed from noncustodial to custodial when the police asked Respondent how he comforted the child. However, merely asking questions that result in inculpatory responses does not change a noncustodial interrogation into a custodial interrogation. If this were so, the nature of police investigation would be forever altered. There is no evidence in the record to suggest the circumstances of questioning changed such that a custodial interrogation resulted when the police began to elicit inculpatory information. Hence,

> because there was no custodial interrogation, *Seibert* does not apply.

Again, the dissent noted the administration of *Miranda* warnings do not convert non-custodial situations into custodial interrogations. State v. Doby, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). The State respectfully argues the majority properly held the first oral statement was given in a non-custodial situation, but the situation did not change into a custodial one simply because Navy began to give incriminating statements. Once Navy hinted at his own criminal culpability, the officers read Navy his *Miranda* rights out of the abundance of caution. Neither Navy's incriminating responses nor the officers' administration of *Miranda* rights served to transition a non-custodial situation into a custodial interrogation. As a result, the second and third statements were obtained after the administration of *Miranda* rights and within a non-custodial setting. The State respectfully asserts the second and third statement were admissible for these reasons. Furthermore, the State respectfully believes Seibert does not apply where the first statement preceding the *Miranda* warnings was admissible. The officers were not attempting to

cure an otherwise inadmissible statement with *Miranda* warnings, as Seibert discusses. Rather, the officers administered *Miranda* warnings out of caution, following an already admissible statement. The State asserts this is a fundamental difference in fact, which precludes the application to Seibert in the instant case.

In Seibert, the Court explicitly noted that Seibert was "arrested" and, thus, in custody prior to any questioning by the police. Seibert at 606. Seibert did not abrogate the long-standing principle that *Miranda* warnings are not required when the individual's freedom has not been so restricted as to render him in custody. Thus, if a suspect gives an unwarned, voluntary confession before being taken into custody, a subsequent confession exacted after the suspect has been taken into custody and informed of his *Miranda* rights need not be suppressed. Since Navy was not subjected to "custodial" questioning, *Miranda* warnings were not required. *A fortiori*, Seibert was not applicable.

The State submits it is unclear why the majority found the officers' questions following Navy's first oral statement resulted in the formation of a custodial interrogation. The State would note the environment between the first oral statement and the follow-up questions did not change, so the State disputes it was a "coercive

environment" due to Navy's presence at the police station when he made the incriminating admissions following his oral statement. Oregon v. Mathiason, 429 U.S. 492, 495 (1977). In Mathiason, the United States Supreme Court (USSC) held a station house interrogation was not custodial where the accused, a parolee, came to the station voluntarily, despite the fact that he was told, falsely, that his fingerprints had been found at the scene of a burglary. The USSC held, "police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." See State v. Neeley, 271 S.C. 33, 244 S.E.2d 522, 527 (1978)[holding "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment"].

The State would also dispute the possible argument that Navy's initial oral statement led to him being the focus of their investigation, which amounted to a custodial interrogation. As this Court noted in Easler, the *Miranda* warnings were

"not intended to hamper the traditional function of police officers investigating a crime." State v. Easler, 489 S.E.2d 617, 621 (1997)[quoting Berkemer v. McCarty, 468 U.S. 420, 436 (1984)]; see also Stansbury v. California, 511 U.S. 318, 322-23 (1994) [police officer's subjective belief that person questioned is a suspect is irrelevant to objective "in custody" determination]; Berkemer, 468 U.S. at 236-39 [nature of suspected offense is irrelevant to duty to administer *Miranda* warnings]; Beckwith v. United States, 425 U.S. 341, 347-48 (1976)[holding the fact that an individual is the "focus" of a criminal investigation does not necessarily mean he or she is in custody]; State v. Sprouse, 325 S.C. 275, 478 S.E.2d 871, 875 (Ct. App. 1996)[finding the fact that an investigation focuses on the suspect does not trigger the *Miranda* warnings, unless he or she is in custody].

The State respectfully asks the majority to reconsider its application of Seibert. In Seibert, the USSC explicitly noted Seibert was "arrested" and, thus, in custody prior to any questioning by the police. Seibert, 542 U.S. at 606. Seibert did not change the established principle that *Miranda* warnings in non-custodial situations. Clearly, where Navy gave an unwarned and voluntary inculpatory oral statement that was determined to

be admissible because he was not in custody, his subsequent statements exacted after he was informed of his *Miranda* rights need not be suppressed. Navy's voluntary waiver and subsequent statements following *Miranda* warnings were admissible on that basis alone. Seibert was not applicable to this case.

III. Seibert can be distinguished from Navy on several grounds.

A. Navy is distinguished from Seibert where the officers in Navy did not get a confession prior to the *Miranda* warnings.

In Seibert the officer obtained a full confession pre-*Miranda* and then got the defendant to repeat her confession following her *Miranda*. "Question-first's object, however, is to render *Miranda* warnings ineffective by waiting to give them until after the suspect has already confessed." Seibert at 601. Justice Souter also stated, "This case tests a police protocol for custodial interrogation that calls for giving no warning of the rights to silence and counsel until interrogation has produced a confession." Id. at 604. Justice Souter went on to say, "the sensible underlying assumption is that with one confession in hand

before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble." Id. at 611.

In examining whether a full confession was obtained prior to Navy's *Miranda* warnings, one can look to the factors set forth by Justice Souter in his comparison of Elstad and Seibert.

> The contrast between Elstad and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: **the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements**, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615 (emphasis added)(citing Oregon v. Elstad, 470 U.S. 298 (1985)).

Following Navy's oral statement, Officer Smith informed Navy the victim had been suffocated and there was evidence of broken ribs. Smith asked Navy to explain how he "comforted the baby, touched the baby, and that kind of thing." Navy told them "that he sort of popped the baby in his back when he was on his stomach, and he said he sort of may have patted the mouth to calm the crying." The majority has identified this portion of the officers' discussions with Navy as the time at which the conversation became a custodial interrogation. After these statements, Navy took a cigarette break and was then given his *Miranda* rights.

According to Justice Souter, in analyzing the effectiveness of the *Miranda* warning, one must consider the completeness and detail of the questions and answers in the first round of interrogation. In Seibert, Justice Souter stated, "the questioning was systematic, exhaustive, and managed with psychological skill." Seibert at 616. In Navy, the officers asked only a few questions between his non-custodial oral statement and his *Miranda* warning. The questions were limited and brief, lacking completeness or extensive detail. The State submits Smith simply asked Navy how he comforted and touched the baby. Smith did not seek a full confession at this point, but instead gave

Navy his *Miranda* rights. As a result, the questions leading up to Navy's *Miranda* were not systematic or exhaustive and did not meet the initial prongs of Justice Souter's test.

Justice Souter also states the court must consider the overlapping content between the pre-*Miranda* statements and the post-warning statements. The Navy majority summarized the additional information provided in the post-warning statements as follows:

> Following the *Miranda* warnings, respondent gave his second statement, this one in writing, at 11:40 am. Significantly, in this second statement, respondent described the events as "the same as in his first statement," except that:
>
> 1) He could not get the child to be quiet, and while the crying child was sitting up in the crib, respondent put his hand over the child's mouth, but did not hold it there.
>
> 2) Respondent then laid the child on his stomach in the crib and "popped" him in the middle of the back, causing the child to cry "one time real loud." Respondent then put his hand over the child's

mouth again to try to stop the crying, then noticed the child could not get his breath, perhaps as the result of the pop on the back.

3) Respondent, thinking he had knocked the child's breath out, went downstairs and returned with a bottle.

4) The child was still "making that noise" "like he was still trying to catch his breath" and respondent panicked. As the child quit and then resumed breathing, respondent went downstairs and got Terry.

5) When respondent and Terry got back upstairs, the child was not breathing.

6) In response to the question: "When you placed your hand over [the child's] mouth, is it possible that your hand covered his nose area as well," respondent answered "It could have been."

Q. When you popped him in the back, did

you have your fist balled up?

A. No sir. It was my flat hand.

Q. How hard did you pop him?

A. Not like trying to kill him or nothing. I just popped him.

...

Q. Why did you pop [him] in the back Sunday?

A. I was frustrated because he was crying.

Following this second statement, which was reduced to writing, Sgt. Weeks contacted the pathologist who had conducted the autopsy to ask whether the actions respondent admitted committing in his second statement "could have caused" the child's death. The pathologist said no, and told the officer that the hand would have had to cover the child's nose and mouth for

at least a minute. The officers then obtained a third written statement from respondent at 12:25 pm. The brief questions and answers are:

Q. [Respondent], is it possible that you held your hand over [the child's] mouth and nose for a longer period of time then you first related to us that you did?

A. Yeah, it could have been longer.

Q. How long do you think it could have been?

A. I don't know.

Q. Can you give us any idea at all how long you might have held your hand over his nose and mouth?

A. A minute, not more than two minutes.

Q. When you removed your hand the last time was [the child] breathing?

A. He was gasping for breath.

Navy at 3-5 (emphasis added).

Pre-*Miranda*, Navy told the officer "that he sort of popped the baby in his back when he was on his stomach, and he said he sort of may have patted the mouth to calm the crying." Post-*Miranda*, Navy admitted to popping the child hard out of frustration and covering the child's nose and mouth simultaneously for one to two minutes. The post-warning statement was not a repetition of a pre-warning information. Rather, the initial statements simply hinted at culpability while the latter statements amounted to outright confessions.

The officer did not get a complete, detailed statement before *Miranda*. Had the officers intended to employ the Seibert-like confessional trickery, the officer would have seized a pre-*Miranda* opportunity to press for a full confession. Rather, the officer felt these statements foreshadowed the possibility of new information from Navy, so he gave Navy *Miranda* rights as "an abundance of caution." Consequently, this is not a situation in which the officer extracted the information he needed and then gave the *Miranda* and got the information a second time. The officer did not get the information he needed prior to *Miranda*, but suspected Navy had more

information he was not relaying to the officer. The information contained in the second and third statement was new information and not the repetition of previously obtained information. Consequently, the disparity between the pre-warning questions and answers and the post-warning statements distinguishes Navy from Seibert.

B. Navy was not subjected to three hours of custodial interrogation before he was Mirandized.

The State respectfully submits the majority misapprehended the time-line in determining how long the officers delayed the *Miranda* warnings. The majority stated, "the officers questioned respondent at headquarters for almost three hours before giving the warning." Navy at 7. As outlined in the opinion, the officers came to Navy's home at approximately 9:00 am. At 9:50 am, Navy began his first oral statement, which was then typed up for Navy's signature and signed by Navy. At the time of the oral statement, the majority found Navy was not in custody. The majority stated the line of questioning did not transition into a custodial interrogation until the officers asked a few questions to follow-up on the oral statement. After

these follow-up questions, Navy was permitted an additional break and informed he was not under arrest. At 11:35, Navy was *Mirandized*.

The officers did not subject Navy to three hours of custodial interrogation prior to a *Miranda* warning. The *Miranda* warning came approximately two hours and thirty-five minutes after the police went to Navy's home. More importantly, however, the bulk of that time was determined to be non-custodial by the majority. As a result, even if the questions following the oral statement properly mark the initiation of a custodial interrogation, the time lapsing between the initiation of the custodial interrogation and the implementation of *Miranda* warnings is a matter of minutes rather than hours. Case law is clear that officers do not need to *Mirandize* individuals who are not in custody, so the time in which Navy was not in custody should not have been added into the calculation of how long the officers waited to give *Miranda*.

C. Navy is distinguished from Seibert where Navy's statements prior to his *Miranda* warning are not clearly inadmissible.

The State proffers Navy is also distinguished from Seibert in regards to the admissibility of the

statements prior to the *Miranda* warning. Seibert is clear that the officer erred in failing to warn the defendant that her prior statement **could not be used against her**. Seibert at 602 (emphasis added). In Navy, the majority found the first statement was admissible, but did not make a clear finding as to the admissibility of Navy's responses to the officer's questions between the oral statement and the *Miranda* warnings. The majority stated the officer failed to inform Navy "that the answers given after the first statement but before the administration of *Miranda* warnings **may not be admissible**." Navy at 6 (emphasis added). Where Navy's statements prior to *Miranda* may or may not be admissible, Seibert does not apply. Rather, Seibert only applies when the prior confession is clearly inadmissible.

D. Navy is distinguished from Seibert where there is no evidence the officers strategically delayed the *Miranda* warning.

Seibert focuses on intentional delay tactics to elicit inadmissible statements from defendants, which officers then attempt to cure with a *Miranda* warning and a re-elicitation of the information. In the present case, the trial judge found there was no evidence of any coercive or improper police behavior

during the questioning process. Contrary to Seibert, the officers in Navy did not ever state they intentionally withheld *Miranda* warnings following the oral statement in a coordinated attempt to extract a confession before *Miranda*. Smith determined more thorough questioning was necessary due to Navy's inculpatory admissions upon being confronted with the victim's suffocation and past rib fractures. Consequently, Smith immediately gave Navy the *Miranda* warnings after Navy's cigarette break. Navy's waiver of those rights was voluntary. In fact, his waiver was undisputed on appeal. Therefore, Navy's statements following his waiver of *Miranda* rights should not have been suppressed.

Seibert stated the circumstances "challenge the comprehensibility and efficacy of the *Miranda* warning to the point that a reasonable person in the suspect's shoes could not have understood them to convey a message that she retained a choice about continuing to talk." Seibert at 603. Here, Officer Smith testified that after he informed Navy the victim had been suffocated, Navy asked if he was under arrest and the officer informed Navy he was not under arrest. Moreover, Navy also admitted that he was informed that he would be back home in "couple of hours." Navy testified, "I just thought that they needed a quick statement

from me and like they said they would take me back home." As a result, the State submits that unlike Seibert, the circumstances in Navy would allow a reasonable person in Navy's shoes to believe he had a choice about continuing to talk.

Seibert affirmed the trial court's holding that Seibert was distinguished from Elstad because the warnings had intentionally been withheld. Seibert at 600. Justice Kennedy noted, "The warning was withheld to obscure both the practical and legal significance of the admonition when finally given." Id. at 602. In this instance, there is no evidence the warnings were intentionally withheld. Absent evidence of intentional conduct by police to delay the *Miranda* warning, the State submits Seibert does not control. Rather, the State argues Elstad applies.

Though the State asserts the questioning never escalated into a custodial interrogation, if it had, it would have been difficult for the officer to detect when the actual custodial interrogation began. Where even the dissent disputes the transition in fact occurred, the State submits the officer was unlikely to have realized he had entered into the zone of custodial interrogation and a *Miranda* was required. As the majority noted, Justice Kennedy wrote a separate concurring opinion in Seibert, stating:

> **An officer may not realize that a suspect is in custody and warnings are required**, and may not plan to question the suspect or may be waiting for a more appropriate time. Suppressing post-warning statements under such circumstances would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence." *Elstad, supra,* at 308, 105 S.Ct. 1285.

Seibert at 602 (emphasis added). The State submits Justice Kennedy's words speak to the situation at hand. Even if the situation had become one of custodial interrogation, which the State does not concede it did, the officer did not realize Navy was in custody and warnings were required. As a result, the State submits Elstad applies and suppressing post-warning statements two and three did not deter improper police conduct or serve the "Fifth Amendment goal of assuring trustworthy evidence." Elstad at 308.

Other courts recently confronted with similar scenarios also found Elstad applies, unless police

officers make a deliberate attempt to undermine the *Miranda* warnings. See, *e.g.*, United States v. Kiam, 432 F.3d 524, 532 (3rd Cir. 2006)[explaining that if the suspect's first statement had been improperly unwarned, the district court should have first determined, under Seibert, whether the violation was a deliberate two-step interrogation process and, if it was not, then it must decide whether it was admissible under Elstad]; United States v. Nunez-Sanchez, 478 F.3d 663, 668-69 (5th Cir. 2007)[as no evidence indicated officers made a deliberate attempt to utilize a two-step interrogation strategy, Elstad applied]; United States v. Stewart, 388 F.3d 1079, 1090 (7th Cir. 2004)["Where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, Elstad appears to have survived Seibert"]; United States v. Torres-Lona, 491 F.3d 750, 758 (8th Cir. 2007) [post-warning *Miranda* statement was governed by Elstad, not Seibert, as failure to warn was not deliberate]; Byrum v. State, 282 Ga. 608, 652 S.E.2d 557, 560-61 (2007)[noting that in contrast to the facts in Seibert, "there was no evidence in this case of a plan or design on the part of police to interrogate appellant without first Mirandizing him"]; People v. Lopez, 367 Ill. App.3d 817, 856 N.E.2d 471, 478 (2006)["courts should depart from the Elstad analysis of voluntariness

only where the police set out deliberately to withhold *Miranda* warnings until after a confession has been secured"].

Even assuming, without conceding, Navy was "in custody" following the oral statement and prior to the *Miranda* warnings, the officers' "simple failure to administer the warnings [was] unaccompanied by any actual coercion or other circumstances calculated to undermine [Navy's] ability to exercise his free will." See Elstad, 470 U.S. at 309. There is no evidence the police in this case acted with devious intent. At most, the facts of this case would indicate the police made a "good-faith *Miranda* mistake." Seibert, 542 U.S. at 615. This case stands in stark contrast to the facts presented in Seibert. Absent evidence of a deliberate two-step strategy by the police, the admissibility of Navy's post-warning statements was governed by the Elstad line of cases.

Because Elstad applies, "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." Elstad, 470 U.S. at 318; see State v. Register, 323 S.C. 471, 476 S.E.2d 153, 157 (1996); see also In re Christopher

W., 285 S.C. 329, 329 S.E.2d 769, 770 n.1 (Ct. App. 1985)[noting Elstad held the guarantee against self-incrimination does not require the suppression of a confession made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary, though unwarned, admission from the suspect].

Here, Navy was given *Miranda* warnings prior to the second and third statements. Navy acknowledged his rights on the waiver-of-rights form, and in signing it Navy indicated he made the waiver freely and voluntarily, and without any force, promises, or threats. There was no indication the police officers used coercive tactics to obtain the subsequent statements. The trial judge further determined, based upon the facts presented to him, that the statements were voluntary. Under the circumstances here, "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." Elstad, 470 U.S. at 314. Since Navy voluntarily gave his second and third statements to the police, *Miranda* and Elstad did not require suppression of the statements. Id.

CONCLUSION

For the foregoing reasons, Respondent would respectfully request that the Court grant the

petition for rehearing on the limited issue detailed above.

Respectfully submitted,

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No. 09-1459

IN THE

SUPREME COURT OF THE UNITED STATES

The State of South Carolina,

Petitioner,

v

Kenneth Navy,

Respondent

On Petition for a Writ of Certiorari
To the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent Kenneth Navy respectfully requests that this Court deny the petition for a writ of certiorari.

JURISDICTION

The State asserts that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). That is incorrect; that statute deals solely with cases from federal courts of appeals. This Court may have jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. Factual Background

23 month-old Kenny Navy died on Sunday, February 9, 2003. R. 1269, ll. 12 – 1270, l. 16. That night, the police took a statement from the boy's father, Respondent Kenneth Navy, at Richland Memorial Hospital. Respondent said the child had suddenly just stopped breathing. Kenny Navy was born four months prematurely and had major health problems that required him to be on oxygen after he left the intensive care unit and went home. Although there was evidence the child had improved, evidence showed he was congested and "wheezing" a short time before he ultimately stopped breathing.

A pathologist performed an autopsy on the child. The pathologist concluded, and told the police, that the child had been suffocated.

Two days later, on the day on which Kenny Navy's funeral visitation was scheduled, Investigator James Smith and Sergeant Lancy Weeks went to Respondent's house. It was 9:00 a.m., and Respondent was upset and crying. Officer Smith explained they were going to "get him into the office to interview him further and take another statement from him." R. 1270, ll. 22 – 1271, ll. 4. Respondent asked whether the interview could wait until after

the visitation, but the officers said no. Pet. App. A30. Accordingly, Respondent accompanied the officers to the police station. The officers transported him in the back seat of an unmarked police car.

The police "began the questioning of Respondent" at 9:50 a.m. "with the intention of eliciting a confession." Pet. App. A17. Nonetheless they did not read Respondent his *Miranda* warnings before they began to interrogate him. Under interrogation, Respondent told Smith he was caring for his two children that Sunday afternoon when he heard "Kenny crying like he had a nightmare." Respondent comforted him and went downstairs and got him a bottle. When he returned upstairs, he saw the child was having problems breathing. Respondent panicked and ran downstairs to get his friend Terry to help. When Respondent returned upstairs the child "was lifeless." Respondent brought the child downstairs and began performing CPR. He then picked up the phone and called 911. R. 1277, ll. 2–1280, l. 11. Respondent also told Smith that he explained to the EMS personnel that his son was born prematurely and had "a hole in his heart and lungs." R. 1280, ll. 12–20. Respondent's first statement was given at 9:50 a.m. Pt.App.A.7.

At the conclusion of Respondent's "first statement," Officer Smith informed Respondent that his son had actually been suffocated. "As a result of that, he expressed some shock." R. 1281, ll. 23–1282, l. 8. The police also told Respondent there was evidence his son had broken ribs. R. 1304, ll. 1–6.

The police then continued to question Respondent in an "unwarned custodial interrogation designed to elicit incriminating information." Pet. App. A17. Respondent told Officer Smith he "sort of popped the baby in the back when he was on his stomach and he had patted the baby on its mouth to stop him from crying." R. 1305, ll. 11–1306, l. 15.

At that point, the police took a break from the interrogation so that Respondent could smoke a cigarette in the back parking lot. Officer Smith accompanied him while doing so. Pet. App. A39; R. 1329, ll. 5-22. Indeed, Officer Smith never left Respondent alone to wander anywhere in the Sheriff's Department at any time that day. Pet. App. A39.

After Respondent finished his cigarette, Smith escorted him back inside. The police then gave Respondent his *Miranda* warnings for the first time, and at 11:35 a.m. began to intensely question him about popping the child on the back and patting the child's mouth. R. 1307, ll. 7–24; R. 1420.[1]

Respondent then said he put his hand over the child's mouth only because he could not get the child to be quiet and stop crying. Respondent added, "I knew I knocked out his breath and I figured he would catch it by the time I got back up to the room. I heard him making that noise. It was like he was still trying to catch his breath. That was when I panicked. He quit breathing . . ." R. 1290, l. 5 – 1291, l. 7. The police asked Respondent if it was possible that his hand covered both the child's nose and mouth. Respondent admitted that it was possible. Respondent also said he had never popped the child on the back like that before. R. 1291, l. 8 – 1292, l. 5.

After the police took this statement, they consulted with the pathologist by telephone. The pathologist informed them Respondent would have had to have held his hand over the child's mouth and nose for a longer period of time than a few seconds. At the same time, the pathologist proceeded to the funeral home to perform a further inspection on

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[1] Respondent testified at the pretrial suppression hearing that the police did not give him *Miranda* warnings even as early as they now claimed. Respondent said "he didn't give me that [*Miranda*] until the third one [statement]." R. 1334, ll. 6 –1336, l. 6.

the back of the child. More bruising was then discovered at the funeral home. R. 1292, ll. 21 – 1294, l. 7.

The police then questioned Respondent about whether he could have held his hand over the child's mouth and nose for a longer period. Respondent admitted in his "third statement" that it could have been longer. Respondent said it could have been a minute but not more than two minutes, and that the child was gasping for air when he removed his hand. R. 1295, ll. 6 – 24.

At this point, after three hours of total questioning, the police officially arrested Respondent.

B. Procedural History

1. The State charged Respondent with homicide by abuse. Prior to trial, Respondent filed a motion to suppress all three of his statements to the police. Respondent argued that each was the product of custodial interrogation in violation the dictates of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and its progeny – the first statement because he had not yet been *Mirandized* and the second and third because the *Miranda* warnings were ineffective insofar as he had already made incriminating statements before receiving the warnings. Respondent noted that had been under a physical disability because he had been awake for three days, he was exhausted, distraught, and crying constantly. Respondent had also been interrogated for three hours. R. 1353, ll. 7 – 1355, l. 9.

The trial court denied Respondent's motion. It held Respondent's first statement was voluntarily given and that his second and third statements were given following effective *Miranda* warnings. Tr. 1361, l. 3 – 1364, l. 22.

The State introduced all three of Respondent's statements at trial. Respondent took the stand and denied ever abusing his child or intending to harm him on the day he died. He testified that his first statement was the only correct statement and that he had signed the other two without reading them so that he could go home. Pet. App. A39. He was convicted as charged and sentenced to twenty years in prison.

2. In between Respondent's trial and his appeal to the South Carolina Court of Appeals, this Court held in *Missouri v. Seibert*, 542 U.S. 600 (2004), that when the police utilize a "question-first" technique -- interrogating the suspect before giving *Miranda* warnings, and then getting the suspect to repeat incriminating statements after such warnings -- the subsequent statements must be suppressed because the *Miranda* warnings are ineffective. Respondent thus argued on appeal that his first statement should have been suppressed as a straightforward violation of *Miranda* and that his second and third statements should have been suppressed under *Seibert*. The South Carolina Court of Appeals unanimously agreed, holding that all three of Respondent's statements should have been suppressed. Pet. App. 28a-51a. The court of appeals remanded the case for a new trial. Pet. App. A51.

3. The South Carolina Supreme Court affirmed in part and reversed in part. It agreed with the court of appeals that Respondent's second and third statements were taken in violation of *Seibert* because the police first conducted an unwarned interrogation in which they got Respondent to say that he "popped" the child on the back and patted his mouth, and only then issued *Miranda* warnings to get him to repeat and elaborate on that admission. Pet. App. 15a-19a. The court, however, held that the first statement was admissible because

Respondent had not been in custody until the police told him that they believed that the child had been suffocated.[2]

REASONS FOR DENYING THE WRIT

The State first asks this Court to apply its decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), to the facts of this case and to hold that Justice Kennedy's concurrence in that case controls concerning whether *Miranda* warnings given during a question-first interrogation are sufficient to render post-warning statements admissible. This Court has denied two recent petitions asking this Court to extrapolate a controlling rule from *Seibert* – *Texas v. Martinez*, 130 S. Ct. 53 (2009); *Ohio v. Farris*, 549 U.S. 1252 (2007) – and there is no reason for a different outcome here. As in those cases, the court below correctly applied *Seibert* to a "question first" interrogation and trial record created before that case was decided. As at the time of those cases, there is no meaningful conflict in authority regarding how to apply *Seibert*, the vast majority of courts applying the decision have applied factors and analysis from *both* the plurality opinion and Justice Kennedy's concurrence. No court has decided a case in which strict application of either opinion was outcome determinative. And even if there were meaningful confusion over *Seibert* in the lower courts, this case would be a poor vehicle for resolving it. No judge that has reviewed this case has found that its outcome hinges on whether one of the two *Seibert* opinions exclusively governs "question first" interrogations.

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[2] The three Justices in the majority of the South Carolina Supreme Court were all former long time trial judges. Justice Costa Pleicones had been a resident judge in Richland County where this case arose from, and thus likely was personally familiar with the police department at issue. Sitting Associate Justice James Kenzer Barber, III, who also voted with the majority, was a resident judge in Richland County at the time this appeal was heard in the State Supreme Court.

The State also asks this Court to review the South Carolina Supreme Court's determination that Respondent was "in custody" for purposes of *Miranda* when he gave the statements at issue. That is an entirely fact-bound issue that the court below decided correctly. Further review is not warranted.

I. The South Carolina Supreme Court's Application of *Seibert* to the Facts of This Case Does Not Warrant Review.

1. The Supreme Court of South Carolina correctly held that this Court's decisions in *Seibert* and *Oregon v. Elstad*, 470 U.S. 298 (1985), require the suppression of Respondent's second and third statements to the police. In *Elstad*, the defendant made a cursory, one-sentence inculpatory statement in his own living room, before his arrest. 470 U.S. at 300-01. The officer's failure to provide *Miranda* warnings was an "oversight" apparently due to "confusion" as to whether the defendant was actually in custody at the time. *Id.* at 315-16. Officers transported the defendant to the police station where, an hour later, a different officer read him his *Miranda* warnings. *Id.* at 301. The defendant made a full confession that went far beyond the initial statement he provided in his living room. *See id.* at 301-02. This Court held that the defendant's post-warning confession should not be suppressed solely because he had made an unwarned inculpatory statement. *Id.* at 318.

The interrogation in Seibert represented the "opposite extreme." 542 U.S. at 616 (plurality opinion). The defendant in *Seibert* confessed during an initial interrogation conducted at the police station, before any *Miranda* warnings. *Id.* at 604-05 (plurality opinion). After a short break, the same police officer gave defendant her *Miranda* warnings, and continued the interrogation, in the same location, eliciting a confession that was "'largely a repeat of information . . . obtained' prior to the warning." *Id.* at 605-06 (plurality opinion). In contrast to *Elstad*, the omission of *Miranda* warnings was not an

"oversight," and there was no doubt that defendant was in custody. *See id.* at 616 (plurality opinion). The Court thus held – though a plurality opinion and a concurrence by Justice Kennedy – that defendant's post-*Miranda* confession was inadmissible.

Contrary to the State's various fact-intensive arguments, Pet. 29-38, the South Carolina Supreme Court properly concluded that the *Seibert* plurality opinion required suppression of Respondent's second and third statements. The plurality explained that "it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle," especially where nothing is "said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led [Respondent] through a systematic interrogation." 542 U.S. at 614, 616. That is just what happened here. Each relevant round of questioning here occurred at the police station and was conducted by the same officers. "The officers began the questioning of Respondent with the knowledge that he child had been suffocated and with the intention of eliciting a confession." Pet. App. A17. They did not give *Miranda* warnings, deciding instead to commence "an unwarned custodial interrogation designed to elicit incriminating information." Pet. App. A17. Once they obtained incriminating statements, the police allowed Respondent a quick, "supervised cigarette break" and then "immediately" administered *Miranda* warnings and resumed interrogation. Pet. App. A17. Respondent repeated, and elaborated on, the

"same" information he had just given in a way that intertwined the two interrogations. Pet. App. A9.[3]

The State also asserts that Respondent's statements "would have been clearly admissible under Justice Kennedy's test." Pet. 38. This assertion is unfounded. Justice Kennedy wrote in *Seibert* that statements should be suppressed when (1) "the two step interrogation technique was used in a calculated way to undermine the *Miranda* warning" and (2) the police took no measures to cure the situation. 542 U.S. at 621-22 (Kennedy, J., concurring in the judgment). Both of those things occurred here. First, the South Carolina Supreme Court explained that the officers interrogated Respondent "with the intention of eliciting a confession" and that the unwarned custodial interrogation was "designed to elicit incriminating information" outside of *Miranda*.[4] Pet. App. A17. Second, "none of the curative measures suggested by Justice Kennedy, i.e., an additional warning that the answers given . . . before the administration of *Miranda* warnings may not be admissible, a substantial break in time, or change in circumstances, occurred here." Pet. App. A17 (footnote omitted). In these circumstances, "a reasonable person in [Respondent's] situation" undoubtedly would not "understand the import and effect of

[3] For example, respondent's pre-*Miranda* admission to popping the child on the back rather than simply patting him was an admission to improperly hitting the child and his subsequent post-*Miranda* explanation that he popped the child on the back because "I was frustrated because he was crying" was inextricably entwined with his pre-*Miranda* admission of wrongdoing. It was simply an attempt to explain his pre-*Miranda* admissions.

[4] Acting Associate Justice James Rezner Barber, III, who voted with the majority of the South Carolina Supreme Court, is a Circuit Court Judge residing in Richland County, South Carolina, where this case arose, and it is more than fair to conclude he consequently was confronted with the contentions of Investigators Smith and Weeks on prior occasions. Judge Barber was in the highly unusual position of being able to determine, from longtime personal experience, whether the actions of Investigators Smith and Weeks in utilizing the question first method were deliberate for purposes of Justice Kennedy's test. Justice Pleicones was similarly well situated as a former Richland County Circuit Court Judge.

the *Miranda* warning." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

Moreover, even if the police's failure to provide warnings here had not been deliberate, this Court's decision in *Elstad* would still dictate that the statements should have been suppressed. In *Elstad*, which not only Justice Kennedy's *Seibert* concurrence but also the dissent endorsed, this Court recognized that a midstream *Miranda* warning may be "improper" – and thus insufficient to avoid suppression of post-warning statements –if the officer "exploit[s] the unwarned admission to pressure Respondent into waiving his right to remain silent." *See Elstad*, 470 U.S. at 316-18; *see also Seibert*, 542 U.S. at 621 (Kennedy, J., concurring in the judgment) (reaffirming this principle); *id.* at 628-29 (O'Connor, J., dissenting) (same); *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (evidence that suspect was "tricked" into waiving his rights "will, of course, show that the defendant did not voluntarily waive his privilege."). Here, the officers did just that. "[R]ight after" the Respondent said that he "popped" the child on the back, the police provided *Miranda* warnings, and then asked Respondent to explain why he did that. R. 1304, ll. 18 – 1305, l. 8. Respondent responded that held his hand over the child's mouth out of frustration because the child was crying. Pet. App. A38. As Justice Kennedy observed in *Seibert*, "[r]eference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating." 542 U.S. at 621. Indeed, in a case similar to this one, the Alaska Court of Appeals held that the police officer's interrogation was improper under both the plurality's test in *Seibert* and the exploitation prong of *Elstad* reaffirmed by the other members of the *Seibert* Court. *See Crawford v. State*, 100 P.3d 440, 450 (Alaska Ct. App. 2004). ("[E]xploitation" exception of *Elstad* met where officer elicited

confession, immediately administered *Miranda* warning, "and then, essentially without pause, . . . reminded [the defendant] of his confession and asked him to re affirm it.").

2. The State asserts that courts are "split over whether Justice Kennedy's test represents the *Seibert* holding." Pet. 5. But, in reality, no significant disagreement exists regarding *Seibert*.

Court after court has determined, just like the South Carolina Supreme Court implicitly decided in this case, that question first cases after *Seibert* come out the same way regardless of whether one applies *Seibert*'s plurality's opinion, Justice Kennedy's opinion, or an amalgam of the two.[5] While Justice Kennedy in *Seibert* placed more

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[5] *See, e.g.*, *United States v. Heron*, 564 F.3d 879, 885 (7th Cir. 2009) ("[Defendant's] statements would be admissible under any test one might extract [from *Seibert*]."); *United States v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008) ("We do not need to resolve this issue because regardless of the applicable framework [defendant's] statement must be suppressed."); *United States v. McConer*, 530 F.3d 484, 498 (6th Cir. 2008) (holding that defendant's statements were admissible under both the plurality test and Justice Kennedy's test); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("This case does not require us to determine which opinion reflects the holding of *Seibert*" because defendant's statements "would be admissible under the tests proposed by the plurality and by the concurring opinion."); *United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1137-39 (11th Cir. 2006) (holding that defendant's statements were admissible under both the plurality and Justice Kennedy's test); *United States v. Terry*, 400 F.3d 575, 582 (8th Cir. 2005) (same); *United States v. Felters*, 397 F.3d 1090, 1098 (8th Cir. 2005) (same); *United States v. Briones*, 390 F.3d 610, 613-14 (8th Cir. 2004) (same); *United States v. Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004) (holding that post-warning statements were inadmissible under both the plurality opinion's approach and Justice Kennedy's test); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (noting that when two-step interrogation is deliberate, "the analysis of the *Seibert* plurality and Justice Kennedy's concurrence merge"); *Edwards v. United States*, 923 A.2d 840, 853 (D.C. 2007) (holding that defendant's statements were inadmissible, and concluding that "[t]he result is the same under the plurality's test as under Justice Kennedy's test."); *Alkahala-Sanchez v. Commonwealth*, 255 S.W.3d 916, 922 (Ky. 2008) (applying both the *Seibert* plurality and Justice Kennedy's concurring opinion, and holding that defendant's statements were admissible); *People v. Paulman*, 833 N.E.2d 239, 247 (N.Y. 2005) ("Because the statements in this case are admissible under the plurality's more stringent test, they are necessarily admissible under Justice Kennedy's analysis."); *State v. Dailey*, 273 S.W.3d 94, 107 (Tenn. 2009) ("In this case, we again

emphasis on the police officers' intent to evade *Miranda*, both his opinion and the plurality's require officers who fail to give *Miranda* warnings at the outset of interrogations to give "curative measures," and those curative measures are nearly identical to the objective factors given by the plurality opinion as part of its threshold "effectiveness" inquiry. *Compare Seibert*, 542 U.S. at 615-16 (plurality opinion), *with id.* at 622 (Kennedy, J., concurring in the judgment). It thus is no surprise that the State does not point to any decision in which a court has found that choosing between the plurality or Justice Kennedy's opinion was outcome determinative.

Nor does the State point to any court applying Justice Kennedy's opinion in a way that shows it would have decided this case differently. Rather, the State simply claims that four federal courts of appeals and one state supreme court have "promoted Justice Kennedy's test and held absent evidence of deliberate police action, the court should proceed only under *Elstad*." Pet. 9, 13 (citing *United States v. Kuan*, 432 F.3d 524 (3d Cir.), *cert. denied*, 126 S.Ct. 1453 (2006); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005); *United States v. Courtney*, 463 F.3d 333 (5th Cir. 2006); *United States v. Black Bear*, 422 F.3d 658 (8th Cir. 2005); *Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006)). But as explained above, the South Carolina Supreme Court found, as Justice Kennedy's test requires, that the officers here interrogated Respondent "with the intention of eliciting a confession" and that the unwarned custodial interrogation was "designed to elicit incriminating information" outside of *Miranda*. Pet. App. A17; *see supra* at 9-10.

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determine that it is unnecessary to predict the eventual outcome of the competing *Seibert* approaches because we find that the Defendant's post-warning confession is inadmissible under either the plurality's or Justice Kennedy's test.")

And *Elstad* itself requires suppression here as well. *See supra* at 10. Thus, all of those courts would have required suppression of Respondent's second and third statements too.

Furthermore, the five cases that the State says follow Justice Kennedy's test exclusively are distinguishable in other ways. In *Kiam*, the defendant was not even entitled to *Miranda* warnings at all because the questioning occurred at an international border. *Kiam*, 432 F.3d at 528. In *Mashburn*, the failure to initially provide a *Miranda* warning was plainly an oversight, *see* 406 F.3d at 305, 309 n. 5, and took place in circumstances quite similar to the facts of *Elstad*. *Mashburn*, 406 F.3d at 305. In *Courtney*, the Court held that *Seibert* did not apply because the defendant was not in custody and, in any event, a substantial passage of time passed between the statements. 463 F.3d at 338. Neither of those is the case here. In *Black Bear*, the Eighth Circuit found that *Seibert* was inapplicable because "*Miranda* warnings were given at the *beginning* of a continuous interrogation in the same room by the same officer who witnessed the warning at the outset." *Black Bear*, 422 F.3d at 664 (emphasis added). Again, that is different than this case, where the police gave *Miranda* warnings only after interrogating Respondent for some time. Finally, in *Jackson*, the Kentucky Supreme Court did not even assess whether *Seibert* was violated, deciding instead to remand the case for an evidentiary hearing. 187 S.W.3d at 305. Thus, it is impossible to know whether that court might have decided this case any differently than the South Carolina Supreme Court.

3. Even if there were meaningful disagreement among state and federal courts regarding how to apply *Seibert*, this case, for two reasons, would present a poor vehicle for addressing it.

First, as explained above, nothing in this case turns on whether Justice Kennedy's concurrence in *Seibert* constitutes the controlling opinion in that case. The South Carolina applied both Justice Kennedy's opinion and the plurality opinion and concluded that both required suppression. *See* supra at 9-10.

Second, this case lacks an appropriate evidentiary record for giving any meaningful guidance regarding how to apply *Seibert*. This Court has repeatedly recognized that the development of constitutional principles is best undertaken in the context of concrete cases with fully developed records. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 221 (1983); *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (per curiam). The suppression hearing and trial in this case were held *before* this Court's *Seibert* decision. The South Carolina Supreme Court thus noted that "it is not surprising that defense counsel did not specifically question Investigator Smith whether he was using [a deliberate "question first"] strategy." Pet. App. A18. Still, it was apparent enough from the record that the police's unwarned custodial interrogation of Respondent was "designed to elicit incriminating information." Pet. App. A17.[6] If this Court does decide someday to elaborate on *Seibert*, it should do so in a case in which officers conducted their interrogation in the post-*Seibert* world, and in which the trial court applied factors from the *Seibert* decision to a full factual record.

Awaiting further consideration and application of *Seibert* in the lower federal courts makes particularly good sense because it may become apparent with experience that the

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[6] The government has the burden to establish that it obtained a valid waiver of the right against self-incrimination — including demonstrating the effectiveness of *Miranda* warnings. *Colorado v. Connelly*, 479 U.S. at 157, 167-68 (1986); *Miranda*, 384 U.S. at 475, 478-79. Thus, any deficiencies in the record would have to be construed against the State in any event. The State clearly failed to show that its officers did *not* engage in a deliberate "question first" strategy.

question presented is of little general importance. Cases involving pre-*Seibert* interrogations such as this one are clearing out of the courts, and police departments on the ground have begun adjusting to *Seibert*. As they continue to do so, there is every reason to believe the two-step interrogations triggering litigation will prove rare.

II The South Carolina Supreme Court's Determination That Respondent Was "in Custody" Does Not Warrant Review.

The State's contention that the South Carolina Supreme Court erred in determining that Respondent was in custody during his second and third statements is likewise weak and it does not deserve this Court's attention. The South Carolina Supreme Court applied *State v. Evans*, 582 S.E.2d 407 (S.C. 2003), a state case entirely consistent with federal jurisprudence on when a person is considered in custody. As the South Carolina Supreme Court explained: "[w]hether a suspect is in custody is determined by an examination of the totality of the circumstances, such as location, purpose, and length of interrogation, and whether the suspect was free to leave the place of questioning." Pet. App. A14.

The State, in fact, does not dispute that this quote correctly describes this Court's precedent. Nor does the State argue that the South Carolina Supreme Court's decision creates any kind of conflict in the lower courts. Instead, the State requests this Court's review on two grounds, neither of which are proper grounds for certiorari.

First, the State asserts that the South Carolina Supreme Court misapplied the settled law it correctly recited in that it focused its analysis "on subjective considerations rather than the objective factors prescribed by this Court." Pet. 22. This is incorrect. The South Carolina Supreme Court expressly recognized that the test for custody "is an objective determination, what is, would a reasonable person have believed he was in custody." Pet. App. A14. And the South Carolina Supreme Court properly considered the change in the

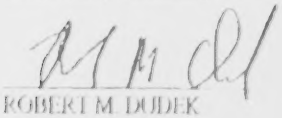
nature of the officers' questioning (specifically, the officers' springing the suffocation charge on Respondent) as relevant to its objective determination that Respondent was in custody. Pet. App. A8. If anything, Respondent was in custody for all three statements, not just the last two. As the South Carolina Court of Appeals explained, the officers transported Respondent to the police station in the back of a squad car, rendering him unable to leave on his own; refused to delay questioning until after Respondent's son's funeral visitation; accompanied him outside each time he took a smoking break; refused to let him to walk about the Sheriff's Department freely; and questioned him for a lengthy period of time. Pet. App. A41-42.

The State also contends that the South Carolina Supreme Court "stretched the facts beyond reasonable interpretation." Pet. 16. Such factual quibbling does not warrant review. In any event, the South Carolina appellate courts correctly recited the facts. The State complains that the police officers testified here that they "did not realize [Respondent] was in custody," and it asserts that Respondent "did not think he was under arrest." Pet. 21, 24. But as the State itself admits, it does not matter whether the officers asserted at the suppression hearing that Respondent "was not in custody" or what Respondent subjectively thought when the questioning began. Pet. 22. The operative test is an objective one. And as just explained, numerous objective factors made clear that Respondent was in custody.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

July 30, 2010

No. 09-1459

IN THE

SUPREME COURT OF THE UNITED STATES

The State of South Carolina

Petitioner,

v.

Kenneth Navy,

Respondent

CERTIFICATE OF SERVICE

I certify that copies of the brief in opposition in this case have been served upon opposing counsel by mailing copies in envelopes properly addressed with postage prepaid on this 30th day of July, 2010.

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ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2010.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018